(25,099)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 88.

GEORGE W. EGAN, PLAINTIFF IN ERROR,

vs.

CHARLES S. McDONALD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

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a In the Supreme Court, State of South Dakota.

GEORGE W. EGAN, Plaintiff,

vs.

CHARLES S. MCDONALD, Defendant.

I, E. F. Swartz, Clerk of the Supreme Court of the State of South Dakota, do hereby make return to the writ of error directed to said Court by the Supreme Court of the United States, which writ of error is hereto attached, and do herewith transmit a true and complete copy of the record of said action and appeal in the Supreme Court of the State of South Dakota, and a copy of all proceedings in said case in said Court; and I hereby certify that in pursuance of the statute and the rules promulgated by the Supreme Court of the State of South Dakota, there was filed in this Court on the 10th day of June, 1914, a certified copy of notice of appeal to the Supreme Court of the State of South Dakota from the Circuit Court of Minnehaha County, South Dakota, on the part of the above named plaintiff and appellant, from the judgment of said Circuit Court entered upon the trial of said action, and from the order of said Circuit Court overruling and denying the motion of said plaintiff and appellant for a new trial of said action in said Circuit Court; that the following is a true copy of the said certified copy of notice of appeal, as the same appears of record, on file in my office, to-wit:

b STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In Circuit Court, Second Judicial Circuit.

GEORGE W. EGAN, Plaintiff,

vs.

CHARLES S. MCDONALD, Defendant.

Notice of Appeal to the Supreme Court.

To Charles S. McDonald, the above-named defendant, and to Bailey & Voorhees, his attorneys, and W. C. McConnell, Clerk of the Circuit Court, Second Judicial Circuit thereof, within and for the County of Minnehaha and State of South Dakota:

You and each of you will please take notice that the plaintiff and appellant, George W. Egan, appeals to the Supreme Court of the State of South Dakota from the judgment made and filed herein and duly docketed on the 19th day of February, 1914, in favor of the defendant and against plaintiff, for the sum of Sixty four dol-

lars and forty five cents ($64.45) costs in said action, and also that certain order overruling a motion for a new trial made by plaintiff, which said order was made by the Court on April 25th, 1914, and filed and entered in the office of the Clerk of the Circuit Court in and for Minnehaha County, South Dakota, on May 2nd, 1914, and duly recorded in Judgment Book "28", Page 510; and the said plaintiff and appellant above named hereby appeals to the Supreme Court of the State of South Dakota from the whole of said judgment, and from the order of the Court denying plaintiff's motion for a new trial in said action.

Dated at Sioux Falls, South Dakota, this 16th day of June, A. D. 1914.

GEO. W. EGAN,
Attorney for Plaintiff, pro Se. Se.

Admission of Service.

Due and personal service of the above and foregoing Notice of Appeal to the Supreme Court, and Undertaking on Appeal to the Supreme Court is hereby admitted at Sioux Falls, South Dakota, this 20th day of June, A. D. 1914.

BAILEY & VOORHEES,
Attorneys for Defendant.
W. C. McCONNELL,
Clerk of Circuit Court in and for Minnehaha County, South Dakota, Second Judicial Circuit.

(Endorsed:) Filed June 22, 1914. Minnehaha County, S. D. W. C. McConnell, Clerk Circuit Court.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

I, W. C. McConnell, Clerk of the Circuit Court within and for said County and State, do hereby certify that the within and foregoing Notice of Appeal to the Supreme Court is a full, true and complete copy of the original Notice of Appeal to the Supreme Court now on file in my office in the case of George W. Egan, Plaintiff, vs. Charles S. McDonald, Defendant.

In testimony whereof, I have hereunto set my hand and the seal of said Court, at Sioux Falls, South Dakota, this 22 day of June, A. D. 1914.

[SEAL.]

W. C. McCONNELL,
Clerk of the Circuit Court,
By E. J. ANDERSON,
Deputy Clerk.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

In Circuit Court, Second Judicial Circuit.

GEORGE W. EGAN, Plaintiff,

vs.

CHARLES S. MCDONALD, Defendant.

Notice.

To the Clerk of the Supreme Court of the State of South Dakota:

You will please take notice that the record in the above entitled action was fully completed settled and allowed, as will more fully appear by the Certificate of the Judge thereto attached, on the 25th day of April, A. D. 1914.

W. C. McCONNELL,
Clerk of the Circuit Court.

(Endorsed:) 3643. Egan vs. McDonald. Certified Copy Notice of Appeal and Notice of Settlement of Record. Apr. 25, 1914. Supreme Court, State of South Dakota. Filed Jun- 24, 1914. E. F. Swartz, Clerk.

And afterwards, to-wit, on the 27th day of July, 1914, the said plaintiff and appellant filed in this Court, with due proof of service upon the attorneys for the defendant and respondent endorsed thereon, his brief on appeal, containing an abstract of the record, which said brief, containing an abstract or statement of the record, was served and filed in accordance with the statutes and rules of the Supreme Court of the State of South Dakota (Chapter 172, Laws of 1913, Rules 4, 5, 6, 7 and 8, Rules Supreme Court, as found in 29 S. D. pp. 3-8 and 140 N. W. pp. VII to IX,) providing that the said abstract shall constitute, together with the brief of respondent containing an amended statement of the record (if the same shall by the respondent be deemed necessary), the only record for consideration by the Supreme Court of the State of South Dakota, in the decision of the controversies raised by such appeal, and further providing that the original record of the trial court, settled and certified by the trial judge shall remain in the office of the clerk of the said trial Court and not be forwarded to the Supreme Court of the State of South Dakota, except upon order of such Court, or upon demand of the appellant; and I hereby certify that the following is a true and correct copy of such brief, containing abstract of record of the trial court, assignment of errors, etc., as filed in this court, and as the same appears of record herein, to-wit:

f In the Supreme Court of the State of South Dakota, October Term, A. D. 1914.

3643.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Appeal from the Circuit — of Minnehaha County, South Dakota.

Hon. Joseph W. Jones, Presiding Judge.

Appellant's Abstract, Brief and Argument.

George W. Egan, Attorney for Plaintiff and Appellant, Sioux Falls, S. D.
Bailey & Voorhees, Attorneys for Defendant and Respondent, Sioux Falls, S. D.

Supreme Court, State of South Dakota. Filed Jul- 27, 1914. E. F. Swartz, clerk.

1 In the Supreme Court of the State of South Dakota, October, A. D. 1914, Term.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Appeal from the Circuit — of Minnehaha County, South Dakota.

This is an action brought by plaintiff, George W. Egan, against respondent, Charles S. McDonald, to recover the sum of one thousand dollars and interest thereon paid by appellant to the respondent as part payment on certain land purchased by said appellant, in Buffalo County, S. D., on April 15th, 1911, the balance to be paid on March 1st, 1912, when respondent should furnish appellant with deed and abstract showing merchantable title. Abstract was
2 furnished on March 1st, 1912, but failed to show a merchantable title in respondent, or any title in him. After giving defendant notice of re-cission on account of failure to deliver good title, and demanding return of money paid, which was refused, this action was begun against respondent.

The following statement contains all the material evidence received on the trial, and all pleadings, records, papers and exhibits material to the questions at issue therein.

Complaint.

For cause of action against defendant, the plaintiff complains and alleges:

1.

That on the fifteenth day of April, A. D. 1911, plaintiff and defendant entered into a contract for the purchase, by plaintiff from defendant, of certain real estate described as follows, to-wit: the south half of section twenty-one (21), in township one hundred eight (108), north of range seventy-two (72), west, in Buffalo County, South Dakota, for the agreed price of four thousand ($4,000.00) dollars.

2.

That plaintiff then and there deposited in the hands of defendant the sum of one thousand dollars ($1,000.00) as part of the said purchase money on condition that the sale should be completed on the first day of March, 1912, and an abstract furnished showing a good merchantable title to said premises and a warranty deed
3 conveying good title should be delivered by defendant, as in said agreement specified.

3.

That plaintiff duly performed all of the conditions of said contract on his part, and on the first day of March, A. D. 1912, was ready and willing to receive such deed and abstract as was specified in said agreement, and pay the balance of the purchase money therefor.

4.

That defendant herein, on the first day of March, A. D. 1912, failed and refused to deliver to plaintiff a deed and abstract of said land pursuant to said agreement, and has ever since refused to deliver the same.

5.

That plaintiff, prior to the commencement of this action, made written demand on defendant for the re-payment of said one thousand dollars ($1,000.00); that defendant refused, and still refuses to repay the same or any part thereof, and defendant is now justly indebted therefor to this plaintiff in the sum of one thousand dollars ($1,000.00), with interest thereon from the 15th day of April, A. D. 1911, at the rate of seven per cent. per annum.

Wherefore; Plaintiff demands judgment against defendant
4 for the sum of one thousand dollars ($1,000.00), with interest thereon from the 15th day of April, A. D. 1911, at the rate of seven per cent per annum, together with his costs and disbursements of this action.

GEORGE W. EGAN,
Plaintiff's Attorney.

This complaint was properly verified by plaintiff before a notary public, of Minnehaha County, S. D., and served on defendant June 24th, 1912, and filed in the office of the Clerk of Courts of Minnehaha County, S. D., June 25th, 1912.

Answer.

The defendant in this action for his answer to the complaint of the plaintiff herein:

1.

Admits the allegations contained in the first paragraph of the complaint.

2.

With reference to the allegations contained in the second paragraph of said complaint, defendant states that the plaintiff paid to the defendant, on or about the 15th day of April, 1911, the sum of one thousand dollars ($1,000.00), on account of the contract described in the first paragraph of said complaint, and denies each and every other allegation contained in said second paragraph.

3.

With reference to the allegations contained in the third paragraph of said complaint, defendant denies that the plaintiff duly performed all the conditions of said contract on his part, and on information and belief defendant denies that on the first day of March, A. D. 1912, plaintiff was ready and willing to receive such deed and abstract, as was specified in said contract, and pay the balance of the purchase money therefor.

4.

Denies the allegations contained in the fourth paragraph of said complaint.

5.

With reference to the allegations contained in the fifth paragraph of said complaint, defendant states that he admits that prior to the commencement of this action, the plaintiff made written demand on him for the repayment of the said sum of one thousand dollars ($1,000.00), and that the defendant refused, and still refuses to repay the same, or any part thereof, and denies each and every other allegation in said fifth paragraph contained.

6.

Denies each and every other allegation in said complaint contained, except such as are hereinafter admitted, qualified or explained.

6 Wherefore, defendant prays that the said complaint be dismissed and that he have and recover of the plaintiff his costs and disbursements herein.

BAILEY & VOORHEES,
Attorneys for Defendant,
Sioux Falls, S. D.

Properly verified by defendant, and served upon counsel for plaintiff July 18th, 1912, and filed in the office of the clerk of said court July 24th, 1912.

Trial.

The above entitled action came on for trial before the court, Hon. Joseph W. Jones, presiding judge, at the regular term of said court holden in the court house in the City of Sioux Falls, Minnehaha County, South Dakota, on December 11th, 1912, George W. Egan appearing for plaintiff, and Bailey & Voorhees appearing for defendant, and the following proceedings were had.

BERTHA WALTZ, called and sworn on behalf of the plaintiff examined by Mr. Egan, testified as follows:

I am a stenographer by occupation, and in February and March, 1912, was in George W. Egan's employ; my duties were writing letters, having care of all the correspondence and all legal
7 papers, and in fact, everything pertaining to the office; I remember the occurrence of Mr. Egan's purchasing or agreeing to purchase some land from Mr. McDonald; I had charge of the papers that were turned over in that transaction; I mailed to Mr. McDonald the abstract with the objections that were furnished by Mr. Pierson. Mr. McDonald never tendered to Mr. Egan an abstract and deed in that case, after the objections were filed, to my knowledge.

Q. If he had tendered any such deed and abstract, would it have come into your control as having charge of the office?

Objected to as incompetent, and assuming a fact not proven, which objection the court sustained, and an exception was allowed.

No deed was ever brought there and turned over to me for Mr. Egan from Mr. McDonald.

Deposition of E. E. Pierson, taken pursuant to notice before a notary public in and for Lake County, Indiana, at the time and place specified in the notice, was offered and received in evidence, and read to the jury by Mr. Egan.

E. E. PIERSON, of lawful age, being both duly and solemnly sworn, testified as follows:

My name is E. E. Pierson; 42 years of age; a lawyer by occupation, and reside at Hobart, Ind. I came to Indiana the first part of September, 1912, from Sioux Falls, South Dakota; while residing
8 in Sioux Falls, I was associated with George W. Egan, plaintiff in this case; while I was associated with Mr. Egan I had occasion to examine an abstract purporting to furnish title to a piece

of property described in the pleadings in this action as the south half of section 21, township 108, north of range 72 west, in Buffalo County, South Dakota. Charles S. McDonald, the defendant in this action was claiming to be the owner of that property at the time the abstract was turned over to me; Mr. Egan gave me the abstract to examine; my experience as an abstracter and examiner of titles and abstracts at the time I made this examination had been this: I had either been in the abstract business making abstracts exclusively or examining them in connection with my law business from January, 1905, to April 1st, 1907; since that time and up to the date of the examination of the abstract in question I had been examining abstracts as they came into the office; an abstracter, in order to compile a complete abstract of title should have knowledge of real estate law, and be acquainted with the public records of the county; I examined the title to the land described in the pleadings in this action on or about March 1st, 1912, and prepared a written opinion on the condition of the title; I attached the opinion to the abstract, and
9 turned it over to George W. Egan, and later I delivered it to Charles S. McDonald.

Q. Now, Mr. Pierson, basing your answer upon your experience and training and your experience and knowledge of titles obtained both as an abstracter and examiner of titles, you may state whether or not Charles S. McDonald, on the first day of March, 1912, had a clear merchantable title to that land as shown by the abstract submitted to you?

To which question defendant objected as incompetent, and the witness is incompetent to answer the same, and the further reason that the question calls for a conclusion of the witness and not for a statement of facts, and for the further reason that the same is not the best evidence, and the further reason that it is immaterial to the issues in this action whether or not Charles S. McDonald had, on the first day of March, 1912, a clear and merchantable title to the land in question, which objection the court sustained, and an exception was allowed.

Q. What objection could be legally made to the title?

A. Hin-Tun-Ka-Sau, or Weasel, obtained a trust patent only from the government for this land. This conferred on him possessory right only. The title, the legal title to the land remained in
10 the government. Weasel died. This land was a part of an Indian Reservation over which state courts have no jurisdiction. There was no court of competent jurisdiction that found who were the sole and only heirs of Weasel.

I submitted this abstract to Mr. Egan and called his attention to these objections. I had a conversation with the defendant concerning this title after I had submitted him the abstract; this conversation occurred on or about March 10th, 1912; I talked with Charles S. McDonald at Sioux Falls, South Dakota, in which conversation I inquired if he had met the objections stated in my opinion to the abstract. He stated that he had handed the abstract over to Harry Judge. I remarked I was glad he had turned it over to Mr. Judge because he was a good lawyer, and would know if he had a good title. I had a further conversation with the defendant about this title; during the month of June or July, 1912, I called on Mr. McDonald at

his office in Sioux Falls, South Dakota and inquired whether or not they had met the objections set forth in my opinion of the abstract. He said: "Mr. Judge has taken the matter up with the office of the secretary of the interior and hopes to get a hearing under the Burke law." I replied that Weasel had died prior to the passage of
11 said law; that the same was not retroactive, and therefor- a hearing under it could not be had. Later, I met Mr. McDonald, and inquired if he had obtained a hearing. He stated that the secretary of the interior informed them that such a hearing could not be had, as Weasel had died prior to the taking effect of the Burke law. During this conversation Mr. McDonald said: "I got the $1,000.00 from George, and will pay it back to him if I cannot furnish a good title, but I am entitled to a reasonable time after the first day of March to furnish title." Mr. McDonald never tendered me a deed and abstract to the land prior to or after suit was filed; he never tendered to Mr. Egan, in my presence or offer- to Mr. Egan in my presence, or leave with me at Mr. Egan's office a deed to the land.

Q. State whether or not Mr. Egan had you serve a written notice on Mr. McDonald that the contract was cancelled, and demanding his money back after the first of March, 1912?

To which question counsel for defendant objected on the ground that it was incompetent, immaterial and irrelevant, secondary evidence, and not the best evidence; which objection the court sustained, and an exception was allowed.

Cross-examination:

I first took up my residence in Sioux Falls, South Dakota, in October, 1906, and engaged in the abstract business with
12 James W. Cone, and remained with him until about April 1st, 1907; I practiced law with John Punsey, in Miller, South Dakota, from July 17th, 1909, until latter part of August, 1911. After I left Miller, I was engaged in the practice of law with George W. Egan, Sioux Falls, S. D.; was there from September 1st, 1911, to September 1st, 1912, and came back to Indiana; at the time, or about the time that Mr. Egan gave me the abstract to examine, he did not say anything about his wishes as to whether I should find the title to the real estate in question good or bad; Mr. Egan told me to serve notice of re-cission of contract on Mr. McDonald; at the time he told me to serve notice of re-cission, he did not say he did not believe he had a good bargain, and for that reason he wanted to be relieved of his contract; he did not, before the opinion was written, express a desire to have me reject the title; I first saw this abstract I examined about March 1st, 1912; I have no knowledge that this abstract was in Mr. Egan's possession as early as summer or fall of 1911; I did not examine this abstract in the summer or fall of 1911, or discuss the subject of the title with Mr. Egan; Mr. Egan requested me to prepare the summons and complaint to recover back the $1,000.00 he
13 had paid on the land; Mr. Egan never stated to me that he would accept $500.00 in payment of the $1,000.00 turned over to Mr. McDonald, if McDonald would cancel the contract; I was

admitted to the bar in South Dakota in 1910, and was a member of the bar in the state of Indiana before going to South Dakota.

C. S. McDonald, called and sworn, and examined by Mr. Egan under the statute, testified as follows:

I received Exhibit "B" from the plaintiff in this suit; I think I received another abstract with it. I have seen the letter, Exhibit "C" and read it.

Exhibits "B" and "C" were here offered and received in evidence.

Plaintiff's Exhibit "B."

So much of plaintiff's Exhibit "B" as is material to the issues here joined is as follows:

Mr. George W. Egan: At your request, I have made a further and more careful examination of the title to the south half of Sec. 21, Twp. 108 N., R. 72 West, in Buffalo County, S. D., as the same is disclosed by the attached abstract, consisting of four transfers, Exhibit "A" and the certificate of Dye and Hill, abstracters, dated March 7th, 1912, at 10 a. m. and find, in conjunction with my previous opinion rendered on the same tit-es, as follows:

14 That on December 12th, 1895, the United States Government issued to its ward, Hin-Tun-Ka-Sau, or Weasel, a Trust Patent for the above described lands. Such patent conferred on Weasel a possessory right only while the legal title to said lands was retained by the government.

I must repeat myself by saying that it is a well settled rule of law that "Whoever deals in Inherited Indian Lands does so at his own risk." Therefore I cannot advise you to assume the same risk that R. J. Hutson assumed and probably took into consideration when purchasing this land from the Indians at about $5.00 per acre.

Respectfully submitted,

(Signed) E. E. PEARSON.

Copy of Exhibit "C," G. M. H.

Sioux Falls, S. D., March 8, 1912.

Major R. H. Summers, Chamberlain, S. D.

Dear Sir: Am having a good deal of trouble on the south one half of section twenty-one (21), township one hundred eight (108), range seventy-two (72) (Weasel). The purchaser claims that the probate proceedings are of no value. I bought this from Bob Huston and he tells me that you know all about these titles, and can enlighten me. I have never yet received the patent and wish

15 you would forward same to me as well as any other papers you may have which might be of value. I have sold this to Geo. W. Egan who seems to want to get out of the deal on account of a defective title. Now, Major Bob tells me that you are the best man

on these titles, and have transferred enough of them by this time to know their value. Appreciating your early reply, I am,

Yours very truly,

CHAS. S. McDONALD.

After the date of Exhibit "C" (March 8, 1912), I never furnished Mr. Egan an abstract or deed, and from that good day to this (December 11th, 1912), I never tendered Mr. Egan an abstract or deed. My attorneys have in their possession a notice from Mr. Egan that he wanted his money back in this case. Same is produced. I received Exhibit "D" a letter, from the plaintiff in this suit.

Exhibit "D" is here offered and received in evidence.

EXHIBIT "D."

MARCH 12TH, 1912—10:00 A. M.

Mr. Charles S. McDonald, Esq., Sioux Falls, South Dakota.

MY DEAR MR. McDONALD: After a careful examination I find that the title to the land which I bought of you under contract is
16 very poor, and in no sense merchantable, nor can it be made so. You do not possess a merchantable title and cannot convey one. You are unable to live up to your contract to furnish me such title, so please return my one thousand ($1,000.00) dollars and I presume that technically and legally I would be entitled to the interest thereon, but do not care about insisting upon that at this time, because you may have believed at the time you signed the contract that you could convey a merchantable title.

Please go to the Sioux Falls Savings Bank, and H. R. Dennis will turn the contract over to you upon the repayment to him of the one thousand ($1,000.00) dollars.

Very sincerely and respectfully,

(Signed) GEO. W. EGAN.

G. W. E.—B. W. Enc.
Dict. but not read.

After I got this notice, Exhibit "B" March 12th I did not tender him a deed or abstract. I have never tendered him one.

GEORGE W. EGAN, being duly sworn, in his own behalf, testified as follows:

My name is George W. Egan; a lawyer by profession; have lived in Sioux Falls six or seven years; have been acquainted with defend-
ant fifteen years; first saw him in Iowa at the State Univer-
17 sity; I had a business transaction with defendant touching some real estate in April of 1911.

Q. You may state if you had a conversation with Mr. McDonald about the purchase of some real estate?

To which question counsel for defendant objected for the reason witness testified that the contract was made in writing between plain-

tiff and defendant and written contract is best evidence of agreement between them.

Objection sustained by court and exception allowed.

Q. Did you have a conversation with Mr. McDonald after this contract was made?

A. Yes, I did have two or three conversations with Mr. McDonald after this contract of purchase.

I am unable to state the date of the first conversation with him, but my best recollection is that it was about the 25th day of February, being two or three days after Washington's birthday, 1912. I met Mr. McDonald on the corner by the Minnehaha block, and I said to him "Mac you had better be looking up that title. I am afraid you haven't any title, because you know the Johnson land I was telling you about that I bought, I sent them an opinion on the first of January. I found they had no title, and I think it was the
18 same kind of land as yours and I think you had better look it up." He said he had also some information from Harry Judge, or somebody that his title might be objectionable, but that he would fix it up as soon as he could. I says "I have mortgaged some land I have in Iowa and am ready to turn you over the money according to the contract as soon as you get a merchantable title." He said he would look it up. That was some time the middle or the latter part of February. I had another talk with Mr. McDonald after this first talk that I stated took place some time in February, 1912. I saw Mr. McDonald, and I says "Mac, I am ready to close up this deal." I told him that Mr. Pierson had supplied me with a written opinion, and I had gone over it and gone over the abstract, and that he had no title to the land. He says "You give me a little time to fix it up." I says "Certainly I will, and the law will give you a reasonable time." He said "I want to have Harry Judge write down to Washington. He said he would write down to see if he could fix that title up." That was about the first of March. I told him in that conversation "I am ready to close this up." He says "You don't need to bother about getting the money ready now because there is a defect in the title, and I have got to fix that up first." And then in a week, I think, or a few days after that
19 I had another conversation with Mr. McDonald, making at least, the third conversation after the contract was signed; I met Mr. McDonald again and I says "Mac, I am disappointed that you have not got that title fixed up." He says "We have written to Washington, and Harry Judge tells me they claim back there this land was opened up by the Burke law." I said "The Burke law will not apply to this land, because this man died before the Burke law went into effect." I says "I want to close it up. I either want my land or I want my money." He did not answer that. He passed on his way and I went up to my office. That was some time after the second opinion Mr. Pierson had furnished him. Mr. Pierson furnished him two opinions, and the last one Mr. McDonald told me he had written down to Washington to see if they could cure this title. I stated to Mr. McDonald that I was ready to

turn over the money and close the deal. I said that to him in February, and also on the first of March, and then again just about the 12th or 15th of March. Mr. McDonald came into my office then. I had another conversation with Mr. McDonald about this transaction after the contract; that was about the first of April, between the first and the fifth. Mr. McDonald came into my office between the first and the fifth to collect some rents. I says
20 "Mac aren't you ever going to furnish me a merchantable title to that land?" He says "I don't know what to do. I cannot fix it up." I says "If you don't pay me pretty soon, give me my money back, I will have to sue you." He then laughed and says "I will beat you." I says "I do not want to sue you, but you have had a thousand dollars of my money ever since the 15th day of April, 1911. You admit you have no title, and never furnished me any." He just laughed, and did not say anything. He went out of the office, and I think I did not have any talk with him then until about a week or so before the suit was begun, but do not recollect the exact date; I had another conversation with Mr. McDonald; after refreshing my recollection from the date I begun this suit, which appears to have been about the 18th day of June, I would say it was probably a week before that date, I told him I would have to sue him for that money; I says "Mac, you have given me neither deed, abstract or money." And he laughed and walked off and left me; I then began this suit. I examined the abstract that was submitted from my offices at that time. As an examiner of abstracts and titles, I have the general experience that comes in my law business of twelve years, and the information that I gained about
21 titles in my regular graduate and post graduate courses in the College Law of Liberal Arts.

Q. Did you, in any of these conversations you have testified to having with Mr. McDonald, explain to him the defects to this title. You may state about the time, Mr. Egan.

A. I think this was in the first conversation affecting the title, that I had with Mr. McDonald in February, 1912. I stated to Mr. McDonald that I had gone through the opinion of Mr. Pierson and had examined the authorities and that he had no title to this land because it was government land that had been given in trust to Indians and that the Indian only held under possessory right to occupy the land and that the real title remained in the government; and that this man that they had gotten the land from, from the record—the Indian—had died and that no court of competent jurisdiction had any—had ever fixed upon who the heirs were to the land from the Indian that had died. Mr. McDonald asked me if I thought the probate or county court of Buffalo county could cure that defect, and I told him no. Then I think he told me that he was going to send over that day to see if he could not get some probate records to attach to the abstract. I do not feel certain about that. I told him that there was no court that had jurisdiction over that.
22 That the county court could not adjudicate that as I understand the law governing titles—abstract of title to that kind of land. I told him I had my office write an opinion to Johnson

Brothers on a half section of land within a mile, of that same kind of land. I said "Mac, they very promptly sent me back my money, and they said that they saw that they had no title."

I examined this purported abstract furnished me and examined the objections that had been made to the title.

Q. Mr. Egan, you may state what Mr. McDonald said to you when you told him that you had mortgaged your Iowa land and had made arrangements to make the payments for this land you testified to on or about the 15th day of February, 1912?

A. Mr. McDonald said to me that I did not need to be in a hurry about the money, or make any tender of it, because he said he wanted to fix up the title and said he understood there was a defect in his title. I says to him "Under our contract this payment has to be made and business has to be settled up at the Sioux Falls Savings Bank." "Well," he says, "You won't need to do anything until I call your attention to the fact I have got the title perfected."

That was between the 15th and 25th of February.

23 After refreshing my recollection, I am able to state the exact time of my conversation in the early part of March, with Mr. McDonald. It was March 4th, 1912.

Q. You say state what, if anything, was said at that conversation, between you and Mr. McDonald about the payment of the three thousand dollars due on the land.

A. At the time Mr. McDonald was in my office to collect some rent: When he came in, I said to him, "Mr. McDonald, I have today mailed you a letter and opinion on this land; that I am more certain than ever, that you have no title and I want to make you the formal offer of the money. Under the agreement we must go to the Sioux Falls Savings Bank." He said "It is not necessary to go there. If the title is not right, I will make it right, and as soon as I make it right, I will let you know." Then he took his check and gave me a receipt for the rent of my newspaper plant. I have the memorandum of agreement that was signed by myself and Mr. McDonald referred to in my testimony. Exhibit "E" is the memorandum that Mr. McDonald and I signed. The memorandum does not contain a true statement of the amount of money paid in that transaction; the memorandum shows that $200 was paid and that three thousand dollars was due.

24 Q. You may state to the jury how that memorandum came to show two hundred dollars paid when you paid one thousand dollars?

A. Mr. McDonald prepared this memoranda and brought that to my office. And when he came over with this memoranda I looked it over and I saw that was, cash payment of $200.00, when I was *given* him my check for $1,000. He said he would rather have it appear that way. He says "It does not make any difference to you so long as it shows the exact amount you are to pay, three thousand dollars.

Plaintiff offers in evidence Exhibit "E" G. M. H. and same is read to jury.

EXHIBIT "E."

Memorandum of Sale.

Sold, this 15th day of April, 1911, by Chas. S. McDonald of Sioux Falls, State of South Dakota, to George W. Eagan of the County of Minnehaha, State of South Dakota, the following described tract, piece or parcel of land, situate in the County of Buffalo, State of South Dakota, to-wit:

The south one-half of section twenty-one (21), in township one hundred eight (108), north of range seventy-two (72), west of Fifth P. M. at ten dollars ($10.00) per acre, upon the following terms: Payable at the office of Walkins & McDonald, Sioux
25 Falls, S. D., cash payment of two hundred ($200.00) dollars, the receipt of which is hereby acknowledged, and three thousand ($3,000.00) dollars to be paid on or before the first day of March, 1912. Abstract showing good, merchantable title to be furnished, and a good and sufficient warranty deed to be delivered when payment of $3,000.00 is made. Settlement to be made at Sioux Falls Sav. Bk.

CHAS. S. McDONALD.
GEO. W. EAGAN.

C. S. McDONALD, recalled by Mr. Egan under the statute.

Examined by Mr. Egan, testified as follows:

About March 4th, 1912, I received a letter from Mr. Egan and an opinion and an abstract. Exhibit "F" is the letter I received from Mr. Egan on or about the date it is posted, accompanied by an abstract.

Plaintiff's Exhibit "F" is offered and received in evidence.

EXHIBIT "F."

March 4th, 1912—2:00 p. m.

Mr. Charles S. McDonald, City.

DEAR MR. McDONALD: I am herewith handing to you an opinion on abstract submitted. It seems that the grantor in this
26 case, signed title to this land and that he is unable to deliver to me according to contract, a merchantable title.

Very sincerely and respectfully,

GEO. W. EGAN.

G. W. E.—B. W.

Dict. but not read.

About March 12th I received another letter accompanying an abstract from Mr. Egan; I produced and identified that letter here

yesterday. I do not remember whether, on the 15th day of April, I received another formal notice from Mr. Egan. If I did it is there. Exhibit "G" was delivered to me in person about the date it purports to be.

EXHIBIT "G."

APRIL 15TH, 1912.

Mr. Charles S. McDonald, Esq., Sioux Falls, South Dakota.

DEAR MR. MCDONALD: I notified you several weeks ago that I declared the contract for the purchase of that land forfeited, because you failed to furnish me with a merchantable title, according to the contract on March 1st, 1912.

I hereby and herewith again notify you that I shall refuse to accept the land and I declare the contract forfeited, you having failed to comply with the contract, and I herewith and
27 hereby demand the return by you to me of the one thousand ($1,000.00) dollars, together with 7 per cent interest thereon from the first day of March, 1912.

If I do not receive the return of the said money within a reasonable time, I shall assume that you intend to keep the same and will take such steps as in my judgment may seem necessary to recover it.

Very respectfully,

GEO. W. EGAN.

G. W. E.—B. W.

Mr. Judge never rendered a written opinion in this case.

GEORGE W. EGAN, being recalled, testified as follows:

After my conversation with Mr. McDonald, in February, I have testified to, and my further conversation in March, in which I say he told me that he would waive any tender of any money until he would furnish me an abstract of title, he never tendered or furnished any abstract of title or deed. He did not tender me any abstract of title or deed after his attention was called to the defects in the title and after the conversation in which I said he told me he knew the title was defective, before I brought this suit.

Cross-examination by Mr. Voorhees:

I think this contract was made about the date it bears, date of April 15th, 1911; I don't know why it should be falsely
28 dated. I think my check book shows that I paid him a thousand dollars that date. I think my first conversation with Mr. McDonald after April 15th, 1911, regarding that transaction, after looking up my records, and also from my recollection, was sometime about the middle of January, 1912; maybe along towards the last, and that is the conversation in which I called his attention to the opinion I had sent to the Johnson Bros. January 1st. I met him on the street, I think it was, or it might have been in his office, for I was in there a time or two as I rent some property he has control

of. I met him, and called his attention to the fact that the land I had told him of and he and I discussed that I had bought before; that I had told them they had no title, and that they said they would send my money back. I said to him "I think your land is close to that and you had better be examining your title. He said he would, and that he had Bob Huston, or somebody look at it. I think I first saw the abstract of title when Mr. McDonald brought it in, which I think was about the time of my conversation in February, and I think Pierson took about a week, and then he brought the abstract in and laid it on my desk with the opinion attached to it. I don't know whether the abstract I just referred to was Exhibit "A." I have not examined this, and do not
29 know. I think it is. I have not had this. Mr. McDonald took it away after we sent in the opinion. It has been in his possession, but my judgment is that is the abstract. Mr. McDonald did not hand me an abstract of title at or shortly after the time the contract was made. He brought the abstract to my office the first time I saw it, the latter part of February, 1912, I will not swear to the date positively. At the time Mr. McDonald and I had the conversation at which I bought the land of him, I told him about buying this other land. He says "I have got some in the same township, and adjoining it closely." When Mr. Pierson examined the abstract to the Johnson land and found it defective—because the courts had no authority to administer; then I had that in my mind and I called Mr. McDonald's attention to the fact I had sent an opinion, which I think shows about the first day of January, 1912. I says: "Mac, it may be that your land is in the same condition and you had better look it up."

Q. Your transaction with the Johnson Brothers was prior to the time you made this contract with McDonald, April 15th, 1911?

A. Yes sir, I think I bought this land just about that time. And Mr. McDonald came to me to suggest that he had some land out there. I would not say within two or three weeks.

30 At the time I made this contract with Mr. McDonald I did not know this land was Indian inherited land—Indian inherited title land. I came to know that when I was talking with Mr. McDonald in January, 1912, by virtue of the fact that Pierson had examined the title of the Johnson Brothers land and had reported to me that he had sent an opinion to them. Exhibit "1" G. M. H. looks as if it was from my office, but I do not know whether it is or not. It has got my return on the corner, and is addressed to Walkins and McDonald. I do not know that on or about the 16th day of July, the date stamped on this envelope, Exhibit "1" I sent, or had sent from my office that envelope, enclosing in it abstract of title, Exhibit "A" without the opinion. I would not say anything about that. I never saw the abstract. Not to my knowledge I did not send it or have it sent. It could not have been sent, because I did not have this thing then. I may have seen the abstract prior to the time that Mr. Pierson examined it in March, 1912; I may have seen it a week or ten days before that. According to my best recollection the first time I saw this abstract, Exhibit "A" was some

time in February, but would not state positively, because I do not know, for that was not the only business I had; it may have been before or about the time of the conversation I testified to
31 that I had with Mr. McDonald between 20th and 25th of February (1912), I would not state that I had seen the abstract about the time of the conversation, because I do not know. If I sent that (Exhibit "A") the chances are I sent a letter, and if you will produce the letter, I can identify the letter I sent. I did not testify my next conversation was the latter part of January, 1912. I had a conversation after I sent this opinion to the Johnson Brothers. I had a conversation between the 15th and 25th of February, 1912. The time was coming up pretty close and I had, about that time, negotiated a loan on some property in Iowa to get the money to finish this transaction. I fixed that conversation as near as I could; some time between the 15th and 25th. My thought was it was about the 24th or the 25th. I might be mistaken three or four days in that; my best memory is that my next conversation about this land was on March 4th, 1912, in my office in Sioux Falls. In that conversation which was had the latter part of February I told him I was ready to comply with my part of the contract. I said to him it would be necessary for us to go to the Sioux Falls Savings Bank, because the matter was to be closed up there, and I said to him "Have you fixed up the title?" He says: "I am work-
32 ing on it." He said he had found out there was a defect in the title, the same as I had suggested, and that it was Indian land, and there was no direct administration on it. He did not say at the time what he was doing with reference to having it fixed up. It was later that he told me that. It was later that he told me about Mr. Judge having the title fixed up. It seems to me, according to my best recollection, and the records shows that we sent him the abstract back with the opinion attached to it on the 4th day of March (1912), and then between the 4th and 12th he came back with this abstract again, turned it back to the office, and Mr. Pierson wrote an additional opinion covering the same ground. On the 4th day of March, I wrote Mr. McDonald a letter he admitted getting, and accompanied by the abstract. I saw him that day in my office, and I said to him I had written him that letter and told him he had no title to that land. I says: "I want you to come over to the Savings Bank and I will make you a tender." He says: "Don't tender me any money until I see if I can get this title fixed up." That was the 4th. In my testimony yesterday, if I stated he was having the title fixed up by Mr. Judge, in the February conversation, I mis-spoke, because I meant it was after we had furnished him an opinion, between the 4th and 12th. There would be no object in his going to Mr. Judge
33 until we had given him some objections to the abstract. I cannot answer directly whether an abstract to this property was presented to me twice for examination, or two separate abstracts; I can only say this: that on March 4th I wrote a letter to him and returned the abstract, with the opinion attached. Then some time later, a few days, I do not know the exact time, because I was not

present, and only know on hearsay, that Mr. McDonald brought over some abstract, either the same abstract, or some other one, to the office. On the 12th day of March, 1912, that abstract, with opinion, Exhibit "B" was returned to Mr. McDonald with my letter of March 12th. I ran through these abstracts of title after the opinion was furnished me. My judgment is that Exhibit "A" is the abstract which first came to me and on which Mr. Pierson wrote the first opinion. I would not swear to it for I have not seen it for several months.

Q. I show you Exhibit "3," the same being certified copy of a decision and decree of distribution in the matter of the estate of Hin-tun-ka-sau, or Weasel, deceased, in the county court of Buffalo County, South Dakota, certified to by the clerk of that court March 6th, 1912, showing it was recorded in the office of the register of deeds of Buffalo County, South Dakota, March 6th, 1912, in
34 Book 2 of Miscellaneous Records at page 334, and bearing the abstracter's mark, Exhibit "A" attached to Abstract No. 758. I will ask you if you ever saw that before, and specifically if you did not see that as a part of the second abstract submitted to you by Mr. McDonald on or about 10th day of March, 1912?

Q. Have you seen this Exhibit "3," the certified copy of the final decree of distribution?

A. I saw some of the papers attached to this exhibit, but not all of them, because they were not all of them exhibited to me.

I cannot state positively just what parts of the sheets of this abstract, Exhibit "2" or another one like it, I saw at that time, but I saw some pages, or a copy of it, but I did not see the whole exhibit. I may have seen the sheet marked "No. 758." I may have seen the sheet marked "Exhibit 1," I may have seen the sheet marked "Exhibit 3." I did not see No. "5" that is, the sheet with the figure "No. 5." I did not see the sheet "No. 6" nor the entry No. "7" to the best of my recollection. I do not know whether I saw the sheet that is put in the middle here; referred to at the top of the page as Exhibit "A." Attached to Abstract No. 758. I cannot state whether I saw the sheet that is marked "21-108-72." I suppose that
35 would be Section 21, Township 108, Range 72, in red in the corner." I don't know whether I ever saw that sheet or not. I do not know for sure whether I ever saw what is referred to here as Exhibit "C" and further identified as attached to and made a part of Abstract No. 758. Exhibit "D" attached to and forming a part of Abstract 758 I never saw, and it was not in existence at the time the abstract I refer to was submitted to me, so far as I know, and was no part of any papers that was ever offered to me before this suit was begun, to the best of my knowledge at this time. The sheet called "Certificate of Abstracters, Dye & Hill, Bonded Abstracters," bearing date March 7th, 1912, and signed Dye & Hill, I might possibly have seen. I do not know. The following sheet, entitled "Certificate of Continuation, Dye & Hill, Bonded Abstracters," bearing date June 18th, 1912, I never saw, and it was never presented to me, or any copy of it. The following sheet being identified as "Certificate of Continuation" of Dye and Hill, Bonded Abstracters, bearing date

November 26th, 1912, I never saw and it was never submitted to me and never was in my possession, and never was tendered or offered to me.

Q. Then as I understand it, you saw the title page of the
36 abstract bearing the No. Exhibit "2" and page bearing number 758, and the following sheet bearing entries No. 1 and 2.

A. No, I never saw them in the condition they are in now. I might have seen them in another abstract. This has been made over, and attached, or something. This never was presented to me.

Some part of it I may have seen. I may have seen No. 1 and No. 2. I may have seen No. 3 or a copy, and the sheet bearing entry No. 4 is the same. The abstract as fixed up now bears date November 26th, 1912. I never saw that at all. I may have seen the sheets Exhibit "2" G. M. H. containing the caption page and entries No. "1," "2," "3" and "4." I may have seen Exhibit "A" in connection with entry No. "4" the certified copy of the decree of the county court of Buffalo County, but would not say. The abstract, as it is now, did not exist until the 26th day of November, 1912. The decree is dated October 12th, 1908, and certified copy recorded March 6th, 1912.

Defendant offers in evidence Exhibit "2" G. M. H. limited to: Title page bearing No. 758, purporting to be abstract of title 758; entries 1, 2, 3 and 4, together with Exhibit "A" in connection with entry No. 4, which Exhibit "A" is also marked Exhibit "3" G. M. H.

Also the first certificate upon the abstract, made by Dye & Hill,
37 abstracters, bearing date March 7th, 1912, at 10:00 a. m.

Plaintiff objects to the exhibits offered for the reason first: That the bound up bundle of papers to which these separate sheets are offered, has not been identified. On face it bears evidence of having some sort of a decree dated along August, 1912, long after the transaction was closed, and bearing a certificate as late as November, 1912, and the defendant having admitted that he never, at any time, after the 12th day of March or before that offered any deed or conveyance to this plaintiff, nor any corrections in the abstract, or any warranty deed according to contract; and the further reason that under the pleadings it is irrelevant, incompetent and immaterial to at this time come in and seek to offer or show that they have any title to this land to build it up, as this appears to be from special judgment or decree without any hearing or trial. It is not within the issues. The defendant never claimed that he sought to make the title right, or that he expected to tender any title to plaintiff, but on the contrary swears that he did not, and the whole document, as taken together, is incompetent, immaterial and irrelevant under the issues.

Also object for the further reason, in view of statement of
38 counsel for defendant, admitting there are parts of the proposed bundle of papers which they term an abstract, that had never been submitted to the plaintiff or plaintiff's counsel, and never had been seen by plaintiff or his counsel, and never offered or ten-

dered to plaintiff, and bearing date as late as November 26th, 1912, after this court convened.

Objection overruled, and an exception allowed.

(Appellant's Specification No. I, pages 31 and 32 of transcript.)

COPY OF EXHIBIT "2," G. M. H.

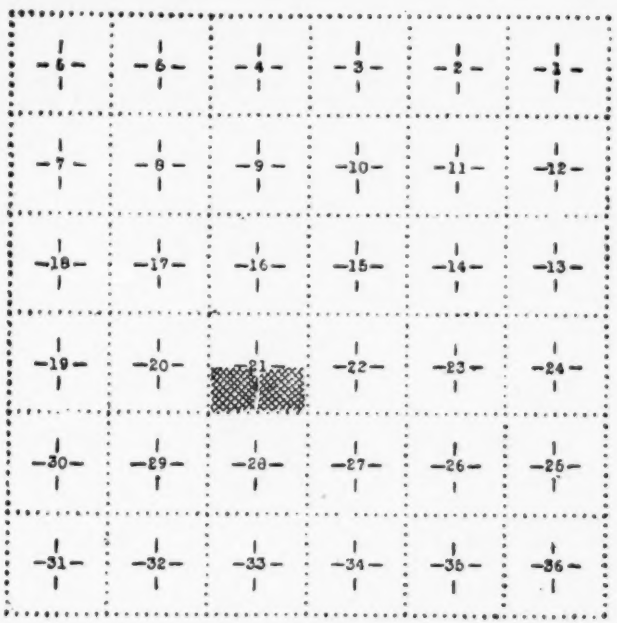
No. 758.

Abstract of Title.

To the following described real estate: The South Half (S. ½), of Section Twenty-one (21), in Township One Hundred Eight (108) North, of Range Seventy-two (72), West of the 5th P. M. containing 320 acres.

Township 108, Range 72.

39



Compiled by Dye & Hill,

Bonded Abstracters,

Buffalo County,

Gann Valley, S. D.

No. 1.

United States, grantors to Hin-Tun-Ka-Sau, or Weazel, grantees. Character of Inst., Trust Patent. Date of Inst., Dec. 12, 1895.

Consideration, —. Date of filing, Apr. 24th, 1909. Hour of filing, 3 p. m. Record Book 9, page 109.
Date of acknowledgement.
Before whom acknowledged.
40 Residence of officer.
Seal, Yes. Witness, No.
Description and remarks.
Describes the S. ½ of Sec. 21-108-72, 320 acres.
(See Exhibit "B" hereto attached.)

No. 2.

Plays With Iron, Wounded Knee, and Mrs. Red Water No. 2, sole and only heirs of Weazel, deceased, grantors to R. J. Huston, grantees.
Character of Inst. Indian Deed, Inherited Lands. Date of Inst. Oct. 9, 1908. Consideration, $1,751.00. Date of filing, Apr. 20, 1909. Hour of filing, 5 p. m. Book 9, page 110.
Date of acknowledgement, Oct. 9, 1908.
Before whom acknowledged, Don V. Moore, N. P. Seal, yes.
Residence of officer, Buffalo County, S. D. Witnesses, two.

Description and Remarks.

Describes the S. ½ of Sec. 21-108-72, 320 acres. Deed recommended for approval by Chief Clerk Comm. Indian Affairs Feb. 27, 1909. Approved by Asst. Sec. Interior, Mar. 2, 1909.
(See Exhibit "C" hereto attached.)

No. 3.

Robert J. Huston, and Louisa B., his wife, grantors to Charles S. McDonald, grantees.
41 Character of Inst., Warranty Deed. Date of Inst., Nov. 3rd, 1910. Consideration, $5,000. Date of filing, Apr. 17, 1911. Hour of filing, 2 p. m. Record Book 10, page 82.
Date of acknowledgement, Nov. 5, 1910.
Before whom acknowledged, James W. Cone, N. P. Seal, yes.
Residence of officer, Minnehaha County, S. D. Witness, No.
Description and remarks.
Describes the S. ½ of Sec. 21-108-72, 320 acres.
Free from incumbrance.

No. 4.

County Court of Buffalo County, S. D., by E. E. Dye, Judge. Attest, Milton H. Derby, Jr., Clerk, grantors to Plays With Iron, Wounded Knee and Mrs. Red Water, No. 2, Heirs of Weazel, deceased, grantees.
Character of Inst., Final Decree of Distribution. Date of Inst.,

Oct. 12, 1908. Consideration ——. Date of filing, Mar. 6, 1912. Hour of filing, 1 p. m. Book 2 M. R., page 334.
Date of acknowledgement. Seal, yes.
Before whom acknowledged.
Residence of officer. Witness, No.
Description and remarks.
42 Describes the S. ½ of Sec. 21-108-72, 320 acres.
Certified to by C. B. Beelaman, Clerk of the Circuit Court as a correct transcript of the original, on file in that office.
See certified copy attached, and marked Exhibit "A."

COPY OF EXHIBIT "3" G. M. H.

STATE OF SOUTH DAKOTA,
County of Buffalo, ss:

In County Court, Holding Terms at Gann Valley, South Dakota.

In the Matter of the ESTATE OF HIN-TUN-KA-SAU, or WEAZEL, Deceased.

Final Decree of Distribution.

This cause, coming on regularly to be heard on the petition of Plays With Iron, filed in this court, and having made and entered an order that the regular administration of said estate be dispensed with, and having on the 12th day of October, 1908, made and entered its findings of Fact, and said estate is now in a condition to be closed and to be divided among the heirs at law of said deceased, and on motion of A. B. Chubbuck, counsel for said petitioner.

It is hereby ordered, adjudged and decreed, that the estate of said deceased, hereinafter particularly described and any other property not now known or discovered which may belong to said estate,
43 or in which the said estate may have an interest, be, and the same is hereby distributed to the following named persons who are decreed to be the sole heirs at law of said deceased, and now the sole and exclusive owners of said estate, in the proportions hereinafter named, viz:

Plays With Iron and Wounded Knee, of Crow Creek, Buffalo County, S. D., each an undivided four-ninths (4-9th) of said estate.

Mrs. Red Water, No. 2, of Crow Creek, Buffalo County, S. D., an undivided one-ninth of said estate.

The following is a particular description of said estate referred to in the decree, and of which distribution is ordered, adjudged and decreed as aforesaid, the same being an allotment of land allotted to said deceased, under the law of the United States, allotting land to Crow Creek Sioux Indians, which said lands and premises are situated in the County of Buffalo and State of South Dakota, and described as follows, to-wit:

South half of Section Twenty-one (21), in Township One Hun-

dred and Eight ((108) North, of Range Seventy-two (72), West of the Fifth Principal Meridian, containing 320 acres.

STATE OF SOUTH DAKOTA,
County of Buffalo, ss:

Office of Register of Deeds.

Filed for record Mar. 6, A. D. 1912, at 1 o'clock p. m. and
44 recorded in Book 2 of Mis. Records, on page 334.

FRANK I. HALL,
Register of Deeds.

Fee $1.00.

(Impression of Register of Deeds Seal.)

STATE OF SOUTH DAKOTA,
County of Buffalo, ss:

In County Court.

I, C. B. Beelaman, Clerk of the County Court, in and for said County, the same being a Court of Record, do hereby certify that I have carefully compared the foregoing copy of Final Decree, of Distribution with the original now on file in this office, and that the same is a correct transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and the seal of said Court, at Gann Valley, this 6th day of March, 1912.

C. B. BEELAMAN,
Clerk.

[Impression of Seal of County Court of Buffalo County, South Dakota.]

Done in open court at Gann Valley, Buffalo County, South Dakota, this 12th day of October, 1908.

By the Court:

E. E. DYE,
Judge of the County Court.

45 Attest:

MILTON H. DERBY, JR.,
Clerk.

[Seal of County Court.]

Original No. 9, State of South Dakota. In County Court, County of Buffalo. In the matter of the estate of Hin-Tun-Ka-Sau, or Weazel, deceased. Final decree of distribution. State of South Dakota, County of Buffalo, ss. In County Court. Filed in the office of the Clerk of the County Court in and for said County on the 12th day of October, A. D. 1908, and recorded in Book "3" of Probate Records of the said Court on page 203. Milton H. Derby, Jr., Clerk of County Court. A. B. Chubbuck, Attorney for Estate.

EXHIBIT "B" ON ABSTRACT.

To all whom these presents shall come, greeting:

Whereas, there has been deposited in the General Land Office of the United States a schedule of allotments of land, dated April 9th, 1895, from the Commissioner of Indian Affairs, approved by the Secretary of the Interior August 9, 1895, whereby it appears that under the provisions of the 11th section of the act of Congress approved March 2, 1889, (25 Stats. 888), Hin-Tun-Ka-Sau, or Weazel,
46 an Indian residing on the Crow Creek Reservation, has been allotted the following described land, viz:

The South Half of Section Twenty-one, in Township One Hundred and Eight, North of Range Seventy-two, West of the Fifth Principal Meridian in South Dakota, containing three hundred and twenty acres.

Now, know ye, that the United States of America, in consideration of the premises and in accordance with the provisions of the eleventh section of said act of Congress of the 2nd March, 1889, hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said eleventh section) for the period of twenty-five years in trust, for the sole use and benefit of the said Hin-Tun-Ka-Sau, or Weazel, or in case of his decease, for the sole use of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; provided that the president of the United States may, in his discretion, extend the said period by a term not exceeding ten years; and if any lease or conveyance shall be made of said lands, or any contract made
47 touching the same before the expiration of the time above mentioned, such lease or conveyance or contract shall be absolutely null and void.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this twelfth day of December, in the year of our Lord one thousand eight hundred and ninety-five and of the Independence of the United States the one hundred and twentieth.

[Seal of General Land Office.]

By the President, GROVER CLEVELAND,
By MR. MCKEAN.

L. Q. C. LAMAR,
Recorder of the General Land Office.

Recorded Vol. 1, p. 275.

STATE OF SOUTH DAKOTA,
County of Buffalo, ss:

Filed for record April 24th, A. D. 1909, at 3 o'clock p. m., and recorded in Book 9 of Deed Records, on page 119.

W. D. KEAN,
Register of Deeds,
By FRED J. GRACE,
Deputy.

Fee 75.

Certificate of Abstracters.

Dye & Hill, Bonded Abstracters.

48 The South Half of Sec. 21, Twp. 108, Range 72.

We hereby certify that we have carefully examined the title to the within described land and that entries No. 1 to 4 inclusive, to which this is attached contains a full and correct abstract of all conveyances upon record in the office of the Register of Deeds of Buffalo County, South Dakota, affecting the same, as shown by the records and indices.

We further certify that there are no judgments, suits pending or mechanic's liens unsatisfied, against Plays With Iron, Wounded Knee, and Mrs. Red Water, No. 2, heirs of Weazel, deceased, R. J. Huston, and Charles McDonald on file or of record in the office of the Clerk of the Circuit and County Courts of said Buffalo County, as shown by his records and indices, which appear to be liens on said land.

We further certify that, according to the records and indices in the County Treasurer's office, there are no real or personal taxes due and unpaid upon said land, and there are no tax sales of said land unredeemed, and that no tax deeds have been issued thereon.

Witness our hand and seal at Gann Valley, S. D., March 7, 1912, at 10:00 a. m.

[Impression of seal of Dye & Hill, Abstracters.]

DYE & HILL,
49 *Bonded Abstracters, Buffalo County, South Dakota.*

(*Testimony Resumed.*)

(Cross-examination of Mr. Egan by Mr. Voorhees:)

Mr. McDonald never tendered me a deed of this property, and he never told me he had a deed for me and was prepared to close this transaction.

Q. When he brought to you this first abstract of title the one marked "Exhibit A," did he state to you that he had a deed for you for this property?

A. No, as I stated before, I do not know when that abstract was

brought. It was along in February some time. He told me he did not want to pay me any money until he gave me a merchantable title, and that he would proceed to do so.

Plaintiff rests.

CHARLES S. MCDONALD, called on behalf of defendant, after being duly sworn, testified as follows, on direct examination by Mr. Voorhees.

I am the defendant in this action; I am engaged in the real estate business in Sioux Falls under the firm name of Walkins & McDonald. I forget whether the contract, Exhibit "E" was made on the morning of the 15th of April, I think it was, though; Mr. Egan telephoned to me at my office and asked me if I knew
50 anything about land in Buffalo County. I told him not very much. He asked me if I had a map of Buffalo County. I told him I had, attached to an abstract of a piece of land I owned. He wanted to know if it would be too much trouble to bring it over to the office; I took it over to him. He told me he was buying a piece of land, or talking of buying a piece of land in that county from Johnson Brothers of Geddes. The abstract showed him that piece of land I owned was a short distance from that land. He asked me what I wanted for it. He finally offered me $12.50 an acre and one thousand dollars down and the balance on the first of the next March.

Q. This contract recites a consideration of $10.00 an acre and two hundred dollars paid on account of the purchase price and three thousand dollars to be paid March 1st, 1912. You may state how the contract came to be worded that way when the real consideration was as shown, four thousand dollars?

To which plaintiff excepted as incompetent and immaterial, which objection the court overruled, and an exception was taken.

After this contract, Exhibit "E" was made on or about April 15th and the one thousand dollars paid by the plaintiff I left the abstract, Exhibit "A" in its then condition, in Mr. Egan's office on the table before him.

51 Defendant offers in evidence Exhibit "A" G. M. H. except the opinion of Mr. Pierson, which offer was objected to by plaintiff as incompetent and immaterial, which objection the court overruled, and an exception was allowed. (Plaintiff's specification No. II.)

EXHIBIT "A."

This exhibit being a mere repetition of transfers one and two of the abstract of title, Exhibit "2" of the land in controversy, to set it out in full would serve no useful purpose and would only burden the court in examining the same. Hence it is omitted.

Testimony of Chas. S. McDonald Resumed.

I have seen the envelope, Exhibit "1" G. M. H. before, being an envelope addressed to Walkins & McDonald, city, bearing the return stamp of George W. Egan, Lawyer, Sioux Falls, South Dakota, and bearing post stamp "Sioux Falls, July 19," apparently 12:30 p. m. 1911." It was received by Walkins & McDonald in the due course of mail.

Defendant offers in evidence Exhibit "1" G. M. H., and same received in evidence.

COPY OF EXHIBIT "1," G. M. H.

Return in 3 days to George W. Egan, Lawyer, Sioux Falls, South Dakota.
(Postmark.)

52 SIOUX FALLS, S. D., Jul- 19, 12:30 P. M., 1911.

Walkins & McDonald, City:

I put the abstract in the safe; it remained there until, I forget the date I submitted it to Dye & Hill, Abstracters, at Gann Valley, to be continued. I have no recollection of any conversation with Mr. Egan in January, 1912; I did not have a conversation with Mr. Egan some time between the 10th and 25th days of February, 1912; I sent the abstract to have it brought down to date March 1st. I wanted the abstract continued to that time, and it was sent back to me I think on the first day of March, I took it over to Mr. Egan's office. He told me he had not examined the abstract, and wanted further time on it. I left the abstract with him, and in a few days received the first letter from Mr. Pierson. I took the abstract to Harry Judge with this letter of objections of Pierson, and then telephoned out for another abstract to be made, the abstract being a short one, so the second abstract could be returned in a shorter time; I received the second abstract and left it at Mr. Egan's office. I received the abstract with the second opinion of Mr. Pierson around the 8th or 10th. I do not remember whether the letter, Exhibit "D" is the one which accompanied the abstract, Exhibit "2" and Mr. Pierson's opinion Exhibit "B." I took the second letter of
53 Mr. Pierson to Mr. Judge as I did the first. At Mr. Judge's suggestion I wrote to the Secretary of the Interior or some department.

Q. You heard the testimony of Mr. Egan to the effect that you had stated to him, Mr. Egan, in a conversation with reference to this matter, that Harry Judge had told you that the title was not good and could not be made good?

Objected to by plaintiff as leading and suggestive, calling for a conclusion of the witness, and not for any statement of facts, and the

witness should be asked to give his view of that conversation without having the words put in his mouth. Objection overruled and exception allowed.

A. I did, yes sir.

Q. Did you make any statement to him to the effect that he need not perform the contract so far as — was concerned?

Objected to by plaintiff as leading and suggestive, which objection the court overruled, and an exception duly taken.

I had a deed to that property in my pocket; Exhibit "4" is the deed to which I refer; it is executed by myself and wife; those are our signatures; I had the deed in my possession the first of March when I went to Mr. Egan's office the time I took the first abstract.

54 Defendant offers in evidence Exhibit "4" which is received without objection, and explained to jury.

EXHIBIT "4."

Know All Men by These Presents: Charles S. McDonald and Alice E. McDonald, husband and wife, grantor, of Minnehaha County, State of South Dakota, for and in consideration of one dollar and other valuable considerations, grants, conveys and warrants to George W. Egan, grantee, of Sioux Falls, South Dakota, P. O., the following described real estate in the County of Buffalo and State of South Dakota: The South One-half of Section Twenty-one (21), in Township One Hundred and Eight (108), North of Range Seventy-two (72), West of the Fifth Principal Meridian, containing Three Hundred and Twenty Acres according to the U. S. Government Survey thereof.

Dated this 1st day of March, 1912.

CHARLES S. McDONALD.
ALICE E. McDONALD.

STATE OF SOUTH DAKOTA,
Minnehaha County, ss:

On this first day of March, in the year 1912, before me, John Barton, a Notary Public in and for the said County and State, personally appeared Charles S. McDonald and Alice E. McDon-
55 ald, known to me to be the persons who are described in and who executed the within and foregoing instrument and acknowledged to me that they executed the same.

JOHN BARTON,
Notary Public, S. D.

[Impression of Notary Public Seal.]

Cross-examination by Mr. Egan:

Q. This Exhibit "4" Mr. McDonald, the Warranty Deed, has been in your possession all the time?

A. Yes sir.

Q. You do not claim you ever turned this over to Mr. Egan?
A. No sir.

I did not say I had no conversation in your office on March 4th, 1912; I do not remember whether I was in your office March 4th or not; I would not necessarily be apt to know whether I was or not; I had business that brought me to your office about the first of the month; the check, Exhibit "I" is dated the fourth; I recognize your signature on the check; I do not say, when I was over to your office on March 4th that I had no conversation at all about this real estate deal. I do not remember what the conversation was in particular. I
56 do not know whether Harry Judge wrote down to Washington; if he did, it would be after March 12th; I don't know whether that was after the second letter of Mr. Egan's. After March 1st I changed my mind about the title. There were some defects you pointed out, and I wanted to satisfy you. After March 1st there was something the matter, some defects with the title in the first abstract. After my attention was called to this, I took Mr. Pierson's letter to Harry Judge; and wrote to Bob Summers under the date of the 8th (March, 1912), and I wrote, or caused to be written to Washington, to the Secretary of the Interior, to try to fix this title up, having a bearing on it. I say I receive this abstract from Mr. Egan's office in July, 1911; there was no letter with it; I went up to Mr. Egan's office again about August 1st again to collect my rent; I said nothing to Mr. Egan about receiving the abstract back without any comments; I do not remember that I ever mentioned to Mr. Egan that I had received the abstract back from his office without any comments; I sent the abstract to Buffalo County the next February; I had the abstract from July to the following February. On March fourth I received notice from Mr. Egan's office that the title was defective; and then began to rectify this title the best I could; around the 7th or 8th, I think, I returned my second abstract to Mr.
57 Egan's office; I do not remember whether or not it was before I wrote that letter to Bob Summers asking him to help me fix the title. My best judgment is it was about the same time. When I brought the second abstract over to Mr. Egan's office, I don't remember whether I had any talk with him or not. I received the exhibits identified here coming back from Mr. Egan's office, on the 12th of March; one was the abstract I had turned in about the 7th, 8th or 9th, or somewhere; some came by mail and some Mr. Pierson brought over; I think I got Exhibit "D" with the abstract; I got it about the time it refers to here; I did not go back to Mr. Egan's office again after March 12th with an abstract; I did not tender him a deed after that or an abstract; I never told him after that I had an abstract fixed up. I never had any talk with him. All this time from the 15th of April (1911), I had this one thousand dollars of money of Mr. Egan's; I never tendered it back to him; Exhibit "J" is the check given me on April 15th, 1911. I got the money on it. I stated to Mr. Voorhees that on or about the 7th, 8th or 9th of March, 1912, I took the abstract, Exhibit "2" to Mr. Egan's office; I took part of the abstract offered in evidence; not all of it; not as it is today; that has been in the hands of my attorney and I don't know

when they fixed it up; I never tendered it to Mr. Egan after
58 they fixed it up. The part of Exhibit "2" I took to Mr. Egan's office or sent over there was the Caption 758 No. 1, No. 2, No. 3, No. 4 and this probate proceedings, I think it is called Exhibit "A" attached to the abstract here, and the certificate of the abstracters certified down to March 7th. I did not tender any of the rest of the abstract to him; I do not know anything about what purports to be certain actions and probate court proceedings here attached, since that time. Mr. Egan, when I went to his office on April 15th did not say he had not bought the Johnson land; he said he had had a letter from the Johnson Brothers about the land. I have told all that was said about the transaction. I did not say I did not see Mr. Egan about the 25th, 26th or 27th of February, or the last of the month; I said I did not remember; I might have seen you the 27th, and I might have seen you the 28th. Exhibit "A" introduced here is the abstract sent by me from Sioux Falls to Gann Valley. After the abstract was returned to me again on the 12th of March, I never said anything further to Mr. Egan about this transaction. The communications from Washington were written after March 12th. I have forgotten when I took this abstract, Exhibit "2" from Harry Judge to Bailey & Voorhees. I was still trying to satisfy the objections
59 made; I did not communicate with Mr. Egan about the title from March 12th to June 18th, (1912); I never offered him his money back. From the time the abstract, Exhibit "2," a part of which is in evidence, was turned over to Bailey & Voorhees until this good day, I have not seen it. I don't think I ever wrote to Mr. Egan or said anything to him in response to his letter of March 12th, 1912; I never went to the Sioux Falls Savings Bank, as the letter suggests. The abstract was in Mr. Judge's possession at the time I got Exhibit "G."

JAMES WALKINS, called and sworn on behalf of the defendant, testified on direct examination as follows:

I reside in Sioux Falls; in real estate business; am a member of the firm of Walkins & McDonald; my partner is Charles S. McDonald, defendant in this case. I know George W. Egan slightly; we were in partnership under the name of Walkins & McDonald during all year 1911; I received the envelope, Exhibit "1" the latter part of July, 1911, and tore it open myself; I took the abstract Exhibit "A," out of the envelope myself; I laid the abstract down on the desk and told Mr. McDonald there was his abstract, and there was nothing in the envelope but the abstract.

Defendant rests.

60 HARRY E. JUDGE, called and sworn, examined by Mr. Egan, testified as follows on direct examination:

My name is H. E. Judge, occupation lawyer; am member of the firm of Aikens & Judge; I know Charles S. McDonald; I advised Mr. McDonald about—between the first and twelfth of March on the title to this land.

Q. To be a little more specific, I will ask you to please examine

Exhibit "B" and state if it was with reference to that land and that opinion?

A. I gave Mr. McDonald some advise with reference to title in which an Indian by the name of Weazel was interested. I do not remember the description of the land, and could not pretend, off-hand, to identify it.

Exhibit "A" was attached, or a duplicate of it to abstract submitted to me by Walkins & McDonald.

BERTHA M. WALTZ, recalled, testified as follows:

I drew the check, Exhibit "I" on the fourth of March; I received Exhibit "H" at the time I drew the check; Mr. McDonald was in the office of George W. Egan, Sioux Falls, on March 4th, 1912; I heard some conversation between Mr. Egan and Mr. McDonald, at the time the check was being drawn, about closing their land deal.

61 Q. I wish you would state, Miss Waltz, to the jury, if you please, what you remember of the conversation and what was said by Mr. Egan to Mr. McDonald at that time?

Objected to as improper rebuttal and incompetent, which objection the court sustained, and exception allowed.

Q. Didn't Mr. McDonald state at that time in your presence to Mr. Egan that he would not ask him to go over to the bank and make a tender; that he would waive that, and he would let him know as soon as he perfected his title.

To which counsel for defendant objected as leading and suggestive and not proper rebuttal, which objection the court sustained, and exception was allowed. (Plaintiff's specification III.)

Q. I wish you would examine Exhibit "A" which purports to be an abstract, and I ask you to state, without reference to the opinion that is attached there when that first came into the office, to the best of your knowledge?

A. About the middle of February, I think. I do not know the exact date but about that time.

I did the writing on Exhibit "I" and that is written on my typewriter; I did not send any abstract to Mr. McDonald in that envelope.

Q. What would you have sent to Mr. McDonald in that envelope?

62 To which counsel for defendant objected as immaterial and calling for a conclusion, which was sustained by the court and exception allowed. (Plaintiff's specification 12.)

GEORGE W. EGAN, recalled, testified:

I heard the testimony of Mr. McDonald as to why the memorandum showed two hundred dollars instead of one thousand dollars, and why I wanted that put in there because you were going to try and put the price down on Johnson Brothers and get a lower price by showing I could get cheaper land here.

Q. You may state what the fact may be when you had really bought the Johnson land?

Objected to as immaterial and irrelevant and not proper rebuttal, and the witness having alread- testified to that conversation, and the preceding question states facts not testified to by the witness McDonald, which was sustained by the court and exception allowed. (Plaintiff's specification 13.)

Plaintiff rests.
Defendant rests.

Plaintiff moves the court to direct the jury to return a verdict for the plaintiff for the reason and on the ground no title has been shown and no good faith and no excuse, and no defense made in this action. Motion granted by the court.

63 *Verdict.*

We, the jury in the above entitled case find in favor of the plaintiff and against the defendant on all the issues in this case and fix the amount of plaintiff's recovery at $1,000 with interest thereon at the rate of seven per cent (7%) from April 15th, 1911, in all, $1,116.00.

JOHN ELSMILLER,
Foreman.

Verdict filed with Clerk of Court Minnehaha County, Dec. 13th, 1912.

That the costs in said action were duly taxed by plaintiff against defendant in the sum of $42.05, and judgment was rendered on the verdict, and signed by the court for the sum of $1,116.00 principal and $42.05, $1,158.05 in all on December 13th, 1912, and duly filed in the office of the Clerk of said Court on said date. That on March 21st, 1913, defendant, through his attorneys Bailey & Voorhees his Notice of Intention to move for a new trial and also his transcript of evidence and specifications of error. That on the 9th day of April, 1913, pursuant to the stipulation of the parties to the above entitled action the motion for new trial was argued before the Hon. Joseph W. Jones, Judge of the Circuit Court in and for Minnehaha County, South Dakota, and on April 26th, 1913, the judge of said court made his order granting defendant a new trial in said
64 action and setting aside the verdict of the jury, and the judgment rendered thereon. That said order was duly filed in the office of the Clerk of the said court on April 30th, 1913, and recorded in Judgment Book "28" page 149.

That on the 9th day of February, 1914, the same being a day of the regular January, 1914, term of court in and for Minnehaha County, South Dakota, the action was again brought on for hearing before the Hon. Joseph W. Jones, Judge of the Circuit Court in and for Minnehaha County, South Dakota, at the court house in Sioux Falls, in said County, and State, the trial being to the court without a jury, same being waived by the parties thereto, and the trial being

had upon the evidence taken at the former trial of said action, and the exhibits admitted thereat, same being by stipulation of the parties thereto, dated February 18th, 1914, and being as follows:

Stipulation.

It is hereby agreed, by and between the parties hereto, through their respective attorneys of record, that in view of the fact that this case was tried to a jury on the 11th day of December, 1912, and that the court, at the conclusion of the testimony, directed a verdict in favor of plaintiff, and against the defendant, and that thereafter, on a motion of defendant for a new trial, the court did, on
65 the 26th day of April, 1913, make an order reversing its former order, and granting a new trial to the defendant, it is, by the parties hereto, stipulated that a jury is waived, and that the case is submitted to the court without a jury, and upon the evidence heretofore introduced at the former trial, and it is understood that each of the parties offers the same testimony that was offered at the first trial, and agrees that the same is to be considered by the court the same as though it were reoffered, the witness recalled, and the exhibits re-read. Findings of Fact and Conclusions of Law waived, and it is admitted that defendant tendered deed and abstract as at former trial.

Dated at Sioux Falls, South Dakota, February 18th, 1914.

GEO. W. EGAN,
Attorney for Plaintiff, Pro Se. Se.
BAILEY & VOORHEES,
Attorneys for Defendant.

Which said stipulation was filed in the office of the Clerk of Circuit Court of Minnehaha County, S. D., February 21st, 1914.

That on the said 19th day of February, 1914, the court made and filed the following Judgment in favor of defendant, and against plaintiff, to-wit:

66 *Judgment.*

This action having been on the calendar of the regular January, 1914, term of this court, came on for trial before the court at the rooms thereof in the court house of the said County of Minnehaha, in the City of Sioux Falls, in said County of Minnehaha on this 19th day of February, 1914, the plaintiff appearing pro-se and the defendant appearing by his attorneys, Bailey & Voorhees and was tried and submitted to the court pursuant to the terms of a stipulation herein between the parties hereto, bearing date the 18th day of February, 1914, and filed herein on the 19th day of February, 1914, by which stipulation a jury was waived and the making of Findings of Fact and Conclusions of Law was also waived, and the action having been submitted to the court for its consideration and

for judgment and the court having considered the evidence herein, and being of the opinion and hereby deciding that the title to the real property described in the complaint herein, to-wit: the South Half (S. ½) of Section Twenty-one (21), in Township One Hundred and Eight (108) North, of Range Seventy-two (72), West of the Fifth Principal Meridian, situated in the County of Buffalo, and the State of South Dakota, was good and merchantable and that the action should be dismissed on the merits and judgment
67 entered herein in favor of the defendant and against the plaintiff with costs to the defendant.

Now therefore, on motion of Bailey & Vorhees, attorneys for the defendant herein, it is hereby

Ordered and Adjudged that this action be and the same is dismissed upon the merits, and that the defendant herein, Charles S. McDonald, have and recover of George W. Egan, the plaintiff herein, his costs and disbursements herein, amounting to Sixty-four and 45-100 dollars, said costs and disbursements to be taxed and allowed by the Clerk of this court and the amount thereof inserted herein by said Clerk.

Done in open court, at the City of Sioux Falls, in the County of Minnehaha, in the Second Judicial Circuit of the State of South Dakota, this 19th day of February, 1914.

By the Court.

JOSEPH W. JONES,
Judge.

Attest:
W. C. McCONNELL, *Clerk,*
By E. J. ANDERSON, *Deputy.*

Which said judgment was duly filed in the office of the Clerk of said court February 19th, 1914, and recorded in Book "28" of Judgments, page 445. On February 26th, 1914, the costs in this action were duly taxed at $64.45, and inserted in the judg-
68 ment. That upon February 27th, 1914, the court upon good cause shown by plaintiff, made its order granting plaintiff a stay of sixty days, of all proceedings, from said date, in which to prepare and serve his Notice of Intention to Move for a New Trial, and to settle his record in said action, said order being filed with the Clerk of said court March 3rd, 1914.

On March 27th, 1914, plaintiff and defendant, through their respective attorneys of record, made and entered into the following

Stipulation.

It is hereby stipulated and agreed by and between plaintiff and defendant in the above entitled action, through their respective attorneys of record, that the transcript of the testimony taken on the former trial of the above entitled action, and used by defendant in his motion for a new trial in said action, may be used by plaintiff in his motion for a new trial herein, and that plaintiff may attach his assign-

ments of error thereto, and the same may be used by plaintiff in making up his settled record to be used on his motion for a new trial herein, and on appeal to the Supreme Court, if a new trial is denied, with the same force and effect as if said action had been tried de novo before the court and a jury.

69 Dated at Sioux Falls, South Dakota, March 27th, 1914.

GEORGE W. EGAN,
Attorneys for Plaintiff.
BAILEY & VOORHEES,
Attorneys for Defendant.

Said stipulation was duly filed in the Clerk's office of said court. That on April 21st, 1914, attorneys for plaintiff and defendant entered into the following

Stipulation Regarding Evidence.

It is hereby stipulated by and between the parties to this action:

1. That on the 6th day of January, 1914, there was duly tendered to the plaintiff on behalf of the defendant, an abstract of title to the real property described in the complaint herein; that said abstract was the same abstract that was tendered to the plaintiff on behalf of the defendant during the former trial of this action at the November, 1912, term of this court and introduced and received in evidence on said trial and marked on said trial as Exhibit "2" G. M. H.; that said abstract, when so tendered to the plaintiff on the 6th day of January, 1914, was in the same condition as it was when it was tendered to him on said former trial, except that it had been continued and certified to December 29th, 1913, at 2:00

70 o'clock p. m. by Dye and Hill, bonded abstracters of the County of Buffalo, in the State of South Dakota and that their certificate of such continuation showed that the title to the property was unchanged since the certificate of continuation of said abstract of title made by said Dye & Hill on November 26, 1912, at 2:00 o'clock p. m., which certificate, bearing said last named date was the latest continuation certificate on said abstract when it was so tendered to the plaintiff on the former trial.

2. That on the said 6th day of January, 1914, there was duly tendered to the plaintiff on behalf of the defendant, a warranty deed of the said real property executed by the defendant and his wife, Alice E. McDonald, as grantors, to the plaintiff as grantee, which deed was the same deed which had been tendered to the plaintiff on behalf of the defendant on said former trial of this action, and had been introduced and received in evidence on said trial, and marked Exhibit 4, G. M. H.

3. That at the time of the said tender on the 6th day of January, 1914, to the plaintiff of the said abstract and of the said deed, performance by the plaintiff of the said contract described in the com-

plaint herein for the purchase by the plaintiff of the defend-
71 ant of the said real property was duly demanded of the plaintiff on behalf of the defendant, and that the plaintiff, at that time refused to perform the said contract.

4. That on the trial of this action on the 19th day of February, 1914, at the regular January, 1914, term of this court, due and proper evidence of the said tender on the 6th day of January, 1914, of said abstract and of said deed, and of said demand for the performance by the plaintiff of said contract and of the said refusal of the said plaintiff to perform the said contract, was offered in evidence by defendant, that the said offer of said evidence was objected to by the plaintiff on the ground that the same was incompetent, immaterial and irrelevant, that said objection was sustained and that to the action of the court in sustaining the said objection the defendant excepted.

5. That this stipulation shall be filed herein as evidence of the facts hereinabove recited and shall be considered in future proceedings herein as a part of the transcript of the proceedings had on the said trial of this action on the said 19th day of February, 1914, and as a part of the settled record herein.

Dated April 21, 1914.

GEORGE W. EGAN,
Plaintiff and Attorney Pro Se. Se.
72 BAILEY & VOORHEES,
Attorneys for Defendant.

Which said stipulation was duly filed in the office of the Clerk of said court.

Notice of Intention to Move for a New Trial.

That on the 25th day of April, 1914, attorney for plaintiff duly served upon defendant's *at-ney for plaintiff duly served upon defendant's* attorney his Notice of Intertion to Move for a New Trial. upon the following grounds:

1. Insufficiency of the evidence to justify the judgment of the court.

2. That the judgment rendered by the court is against law.

3. Errors in law occurring at the trial. and excepted to by plaintiff.

And on the said 25th day of April, 1914, said plaintiff duly served his transcript and assignments of error, and said Notice of Intention to Move for a New Trial, Transcript, and Assignments of Error, with admission of service thereon were duly filed. April 25th. 1914, in the office of the Clerk of Circuit Court of Minnehaha County, South Dakota, and on said day the clerk duly prepared an index
of said files, and procured the certificate of the court settling
73 the record, said certificate showing that said record, as settled by the court contained the judgment roll, correct transcript of the proceedings of said trial, the evidence received and rejected, so far as the same was necessary for the full determination of the errors specified, and contained all the material evidence received on

said trial, and allowing, settling and certifying the same as the settled record in said action.

Stipulation.

It is hereby stipulated by and between the parties to the above entitled action, through their respective attorneys of record, that service of a notice by the plaintiff of hearing on the motion of the plaintiff for an order herein setting aside the judgment heretofore rendered herein, and granting a new trial in this action in accordance with the notice heretofore served by the plaintiff of his intention to move for a new trial upon the grounds stated in said notice of intention, and upon the settled record herein, be and the same is hereby waived, and that said motion shall be brought on before this court for hearing, and heard at the rooms of this court in the court house in the City of Sioux Falls, Minnehaha County, South Dakota, on the 25th day of April, 1914, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard.

74 Dated March 27th, 1914.

GEORGE W. EGAN,
Attorney for Plaintiff.
BAILEY & VOORHEES,
Attorneys for Defendant.

Which said Stipulation was duly filed in the office of the Clerk of the said Circuit Court.

Order Denying Motion for a New Trial.

This action came on for hearing on the 25th day of April, 1914, pursuant to a stipulation of the parties hereto, upon the motion of plaintiff for an order setting aside the judgment of the court heretofore rendered herein, and granting a new trial in said action, the plaintiff appearing in support of said motion by George W. Egan, Esq., attorney Pro se. se., and the defendant appearing in resistance thereto by his attorneys, Messrs. Bailey & Voorhees, and the said motion having submitted to the court for its decision upon the arguments of counsel and the settled record herein, and the court being duly advised in the premises, and having duly considered, now therefore, on motion of Bailey & Voorhees, attorneys for defendant, it is,

Ordered that the said motion of the plaintiff herein, for
75 an order setting aside the judgment, and granting a new trial of this action, be, and the same is hereby denied.

Dated at Sioux Falls, South Dakota, this 25th day of April, 1914.

By the Court,

JOSEPH W. JONES,
Judge.

Attest:

[SEAL.] W. C. McCONNELL, *Clerk.*

Which said order was duly served upon counsel for plaintiff April 27th, 1914, and filed in the office of the Clerk of Court of Minnehaha County, South Dakota, May 2nd, 1914, and recorded in Judgment Book "28" page 510.

Exceptions to Order.

To the making of the above order plaintiff is hereby granted an exception.

JOSEPH W. JONES,
Judge.

Notice of Appeal to the Supreme Court.

To Charles S. McDonald, the above-named defendant, and to Bailey & Voorhees, his attorneys, and W. C. McConnell, Clerk of the Circuit Court, Second Judicial Circuit thereof, within and for the County of Minnehaha and State of South Dakota:

You and each of you will please take notice that the plaintiff and appellant, George W. Egan, appeals to the Supreme Court
76 of the State of South Dakota from the judgment made and filed herein and duly docketed on the 19th day of February, 1914, in favor of the defendant and against plaintiff, for the sum of Sixty-four Dollars and Forty-five Cents ($64.45), costs in said action, and also that certain order overruling a motion for a new trial made by plaintiff, which said order was made by the court on April 25th, 1914, and filed and entered in the office of the clerk of the circuit court in and for Minnehaha County, South Dakota, on May 2nd, 1914, and duly recorded in Judgment Book "28" page 510; and the said plaintiff and appellant above named hereby appeals to the Supreme Court of the State of South Dakota from the whole of said judgment, and from the order of the court denying plaintiff's motion for a new trial in said action.

Dated at Sioux Falls, South Dakota, this 16th day of June, A. D. 1914.

GEO. W. EGAN,
Attorney for Plaintiff, Pro. Se. Se.

Undertaking.

Whereas, on the 19th day of February, 1914, in the Circuit Court within and for the County of Minnehaha, the above named respondent recovered a judgment against the above named appellant for the sum of Sixty-four Dollars and Forty-five Cents
77 ($64.45), costs of said action, which said judgment was duly filed and docketed in the office of the Clerk of the Circuit Court of Minnehaha County, South Dakota, on said 19th day of February, 1914, and on the 25th day of April, 1914, the Judge of

the Circuit Court in and for Minnehaha County, South Dakota, having made his order denying plaintiff's motion to set aside said judgment and grant him a new trial therein, which said order was, on the 2nd day of May, 1914, duly filed in the office of the Clerk of the Circuit Court of said Minnehaha County, South Dakota, and recorded in Book "28" of Judgments, page 510, and the above named appellant, feeling aggrieved thereby, intends to appeal therefrom to the Supreme Court of the State of South Dakota.

Now therefore, we do hereby undertake that said appellant will pay all costs and damages which may be awarded against him on appeal, or on a dismissal thereof, not exceeding Two Hundred and Fifty Dollars ($250); and do also undertake that if the said judgment so appealed from, or in any part thereof, be affirmed, or said appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed
78 only in part, and all damages and costs that shall be awarded against said appellant on said appeal.

Dated this 16th day of June, 1914.

Principal Sureties.

GEO. W. EGAN.
GEO. E. ADAMS.
M. H. EGAN, M. D.

On June 20th 1914, the plaintiff appealed to this court from the judgment made and entered by the Judge of the Circuit Court in and for Minnehaha County, South Dakota, in favor of defendant and against plaintiff, for $64.45, costs of the action, and for the order of the court dated April 25th, 1914, denying plaintiff a new trial in said action, by serving upon the defendant and his attorneys, a true and correct copy of the Notice of Appeal to the Supreme Court and an Undertaking on Appeal in due form of law, with sufficient sureties approved by the court, which said undertaking provided for the payment of costs on appeal, and also for the payment of the judgment, if the same were affirmed, which said Notice of Appeal and Undertaking on Appeal, with the admission of service thereon was duly filed in the office of the Clerk of the Circuit Court in and for Minnehaha County, South Dakota, on June 20th, 1914, and the fees provided for by law were then and there deposited with said clerk.

79 *Assignments of Error.*

Appellant says there is manifest error on the face of the record, in this:

Assignment I.

The court erred in admitting in evidence Defendant's Exhibits "2" and "3" over plaintiff's objection. (Plaintiff's specification 5, transcript pages 31 and 32.)

Assignment II.

The Court erred in receiving in evidence, over the objection of plaintiff, Defendant's Exhibit "A." (Plaintiff's specification 7, transcript page 35.)

Assignment III.

The Court erred in sustaining defendant's objection to, and refusing to permit the witness Bertha M. Waltz to answer the following question propounded to her on direct examination by counsel for plaintiff:

Q. Didn't Mr. McDonald state at that time, in your presence to Mr. Egan, that he would not ask him to go over to the bank and make a tender; that he would waive that, and that he would let him know as soon as he perfected the title. (Plaintiff's specification 11, transcript page 57.)

Assignment IV.

The Court erred in rendering judgment in favor of de-
80 fendant and against plaintiff on the second trial of the above entitled action, on February 19th, 1914. (Plaintiff's specification 14.)

Assignment V.

The Court erred in finding and deciding, in said judgment dated February 19th, 1914, as follows:

"And the Court having considered the evidence herein, and being of the opinion and hereby deciding that the title to the real property described in the complaint here, to-wit: the South Half (S. ½), of Section Twenty-one (21), in Township One Hundred and Eight (108) North, of Range Seventy-two (72), West of the Fifth Principal Meridian, situated in the County of Buffalo and State of South Dakota, was good and merchantable, and the action should be dismissed on the merits." (Plaintiff's specification 15.)

Assignment VI.

The Court erred in dismissing the above entitled action in its judgment rendered February 19th, 1914. (Plaintiff's specification 16.)

Assignment VII.

The Court erred in rendering judgment for costs in favor of the defendant, and against the plaintiff in the above entitled action. (Plaintiff's assignment 17.)

Assignment VIII.

81 The evidence insufficient to sustain and justify the judgment of the Court in the above entitled action, for the following reasons:

1. That on the 1st day of March, 1912, plaintiff tendered to the defendant the sum of Three Thousand Dollars, under the terms of the contract made by the plaintiff with the defendant, for the purchase of the land involved in this action, which contract is Exhibit "E" herein, and was ready to deliver the said sum of money to said defendant, upon said defendant delivering to plaintiff a warranty deed to the premises described in the contract, Exhibit "E," and an abstract showing merchantable title thereto.

2. That after making the tender of the said sum of money by plaintiff to the said defendant, under the terms and conditions of the contract, Exhibit "E," plaintiff gave defendant every opportunity to make the title to said premises described in Exhibit "E," good and merchantable.

3. That at all times, after the 1st day of March, 1912, up to the bringing of this action, on June 18th, 1912, plaintiff was ready, able and willing to deliver to the said defendant said sum of Three Thousand Dollars upon a good and sufficient warranty deed and an abstract showing good title thereto being delivered to him, covering the premises described in the contract, Exhibit "E."

4. That defendant never tendered to plaintiff a good and
82 sufficient waranty deed, and an abstract showing merchantable title to the premises described in plaintiff's contract, with said defendant, Exhibit "E."

5. That no abstract ever tendered by defendant to this plaintiff showed a good and merchantable title to the premises described in the contract, Exhibit "E."

6. That the title to the premises described in said contract, Exhibit "E" was not good and merchantable, and could not be made so.

7. That defendant never tendered to plaintiff a good and sufficient warranty deed, or any deed to the premises described in said contract, Exhibit "E" or at all.

8. Because time was of the essence of the contract, and defendant did not deliver to plaintiff a good and sufficient warranty deed and abstract showing merchantable title to the premises in controversy, at the time specified in said contract, Exhibit "E," to-wit: March 1st, 1912.

9. That after the defendant, Charles S. McDonald, received plaintiff's objections to the purported title of defendant, or to such title as he had to the premises in controversy, he did not satisfy said objection, and was unable to do so, and has not done so at any
83 time, and such objection were not such as could be satisfied by said defendant.

Assignment IX.

The Court erred in overruling plaintiff's motion for a new trial in this action by its order dated April 25th, 1914.

Brief and Argument.

This action is brought by appellant against respondent to recover the sum of One Thousand Dollars and interest thereon from April 15th, 1911, the day of the payment, that amount having been paid by appellant to the respondent herein as part payment on a certain tract of land in Buffalo County, S. D. The balance of the said purchase price to be paid on March 1st, 1912, upon the respondent's furnishing to appellant a good and sufficient warranty deed, and an abstract showing merchantable title. The undisputed facts in this case disclose that appellant and respondent entered into a written contract on April 15th, 1911, for the purchase of the property in controversy situated in Buffalo County, South Dakota, described as South Half of Section Twenty-one (21), in Township One Hundred Eight (108) North, of Range Seventy-two (72), West Fifth P. M., for the agreed price of $4,000, of which $1,000 was paid down
84 by appellant; the balance to be paid on March 1st, 1912, on the tendering to appellant by respondent of a good and sufficient warranty deed, and abstract showing good merchantable title; the settlement to be made at the Sioux Falls Savings Bank, in Sioux Falls, S. D.

Appellant, on or about March 1st, 1912, received an abstract to the land furnished by respondent; which appellant examined, and the title was found to be defective. A written opinion was furnished and the abstract and opinion submitted to respondent. That on March 1st, 1912, and again about March 4th, 1912, appellant stated to respondent that he was ready to close the deal, if the title was good, but was advised by respondent to wait until the objections raised by appellant had been met. On March 4th, 1912, appellant returned the abstract to respondent with the advise that the title was not a merchantable one, the defect being that the tile was based upon an Indian Trust Patent issued in the year 1895 to one Hin-Tun-Ka-Sau, or Weasel, for said land, under the terms and provisions of the Act of Congress, which act divided a portion of the Sioux Nation of Indians; United States Statutes at Large, 888, known as 25, Approved March 2, 1889. That subsequently thereto, respondent had certain alleged pretended probate proceedings on the estate of Tin-Tun-Ka-Sau, or Weasel, in the County Court of Buffalo
85 County, South Dakota; which purported to decree the lands to certain alleged heirs of said Indian, placed of record, and shown on the abstract, and again tendered the abstract to appellant.

The evidence will further show that appellant made several demands upon respondent for the return of his money, when it became apparent that the title could not be corrected; that sometimes demand was made orally, and sometimes in writing; that upon respondent's refusal to return the money, suit was started. The evidence discloses that no deed was ever tendered to appellant by respondent, and no abstract showing merchantable title ever tendered. Respondent attempted to cure this by making a tender of a

deed and abstract at the trial of this action, long after the deal should have been closed.

This case was tried to the court and a jury at the regular November term of court in and for Minnehaha County, on December 11th, 1912, resulting in a verdict for plaintiff and appellant, for the $1,000 and interest from the date of payment. Subsequently thereto respondent made a motion for a new trial, which was granted by the trial court, and upon the second trial thereof to the court without a jury, judgment was entered in favor of respondent and
86 against appellant, the court specifically finding in its judgment, which was signed and filed February 19th, 1914, that the title of respondent to the premises in controversy was good and merchantable.

A motion for a new trial was then made by appellant, and denied by the court, and from the action of the trial court in rendering judgment for defendant and respondent and against plaintiff, and appellant, finding the title to the premises good and merchantable, and refusing appellant a new trial, said appellant has appealed to this Honorable Court.

The questions to be decided by this court are clear and definite, and may be briefly stated thus:

1. Did respondent have, and did his abstract show in him, a merchantable title, on or about March 1st, 1912.

2. Was respondent in a position to, and did he convey by warranty deed property tendered to appellant, the South Half of Section Twenty-one (21), in Township One Hundred Eight (108) North, of Range Seventy-two (72) West, in Buffalo County, South Dakota, by a good and merchantable title, which premises, it is admitted appellant purchased from respondent on April 15th, 1911.

The above being the only questions before this court, to
87 these, with terseness, brevity, and we hope with success, we shall direct our attention.

Let it be remembered that the land in controversy is situated in Buffalo County, South Dakota, in a part and portion of that large expanse of territory occupied by the Sioux Indians, and over which the United States Government originally exercised exclusive jurisdiction.

The first act affecting that body of land of which the tract in controversy is a portion, was passed in 1887 by the United States Congress, and was known as Chap. 119, approved February 8th, 1887.

To this original act we first turn our scrutiny for if the title in controversy ever passed to anybody at any time, it first must find a starting point in this act of 1887.

Turning our attention particularly to said Chapter 119, and the portions thereof which interest us, we find the following:

Chap. 119.

Be it Enacted, by the Senate and House of Representatives of the United States of America in Congress Assembled: that in all cases where any tribe or bank of Indians has been, or shall hereinafter

be located upon any reservation created for their use, either by treaty
stipulation, or by virtue of Act of Congress or executive order,
88 setting apart the same for their use, the President of the
United States be, and he hereby is authorized whenever, in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed, if necessary and to allot the lands in said reservation in severalty, to any Indian located thereon, in quantities as follows:

To each head of a family, one quarter of a section.

5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to be issued therefor, in the name of the allottees which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of such period, the United States will convey the same by patent to such Indian, or his heirs as aforesaid, in fee, discharged of such trust, and free of all charge or incumbrance whatsoever; Provided, that the President of the
89 United States may in any case, in his discretion, extend the
period, and if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. Provided, That the law of descent and partition in force in the state or territory where such lands are situate, shall apply thereto after patents therefor have been executed and delivered.

6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made, shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no state or territory shall pass or enforce any law denying such Indian within its jurisdiction, the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States, who has voluntarily taken up, within said limits, his residence separate and apart from any tribe
of Indians therein, and has adopted the habits of civilized
90 life, is hereby declared to be a citizen of the United States,
and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been, or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner, impairing or otherwise affecting the right of any such Indian to tribal or other property.

Approved February 8th, 1887.

The above act after it was approved, was known in Indian legislation as the "general allotment act."

Following this Act, and directly carrying out its intention, and with direct reference thereto, Congress passed an act known as 25 United States Statutes at large, 888, entitled:

"An Act to divide a portion of the Reservation of the Sioux Nation of Indians in Dakota, into separate reservations, and to secure the relinquishment of the Indian title to the remainder, and for other purposes," which act was approved March 2nd, 1889.

Under the last entitled act, which provided for allotments to Indians, the Commissioner of Indian affairs completed a schedule of allotments for the Indians on that portion of the Reservation
91 in which the land in controversy was located, which schedule of allotments bore date April 9th, 1895, and which was approved by the Secretary of the Interior of date August 9th, 1895. Among the Sioux Indians residing on the Crow Creek Indian reservation in what is now the County of Buffalo, and State of South Dakota, was one Hin-Tun-Ka-Sau, or Weasel, an Indian to whom was allotted under the provisions of the above two acts, the land in controversy, to-wit: the South Half of Section Twenty-one (21), Township One Hundred Eight (108) North, of Range Seventy-two (72) West.

Hin-Tun-Ka-Sau, or Weasel, received his allotment; and his evidence of title is what is known as a Trust Patent, which instrument bore date December 12th, 1895, and was recorded in the office of the Register of Deeds of Buffalo County, on April 24th, 1909, at 3:00 p. m. in Book "9" of Deeds, page 119.

Since, if the respondent in this case has any title, and since, also, whatever title he had came through Hin-Tun-Ka-Sau, or Weasel, and since, too, we have the record of the Trust Patent, by which the Indian received whatever title he had from the government, the only way we can tell what kind of title the respondent received from the Indian is to see what kind of title the Indian received
92 from the government. Hence we propose to place early before the court in this brief and argument, this Trust Patent, which we claim, as itself recites, gave nothing to the Indian but a possessory right of occupancy, the fee title to remain where it still remains, if our contention be corrected, in the United States Government. We respectfully invite a careful perusal of the following instrument and its provisions:

"That the United States of America, in consideration of the premises and in accordance with the provisions of eleventh section of said act of Congress 2nd March, 1889, hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said eleventh section) for the period of twenty-five years in trust for the sole benefit of the said Hin-Tun-Ka-Sau, or Weasel, or in case of his decease, or the sole use of his heirs according to the laws of the state or territory where such land is located, and at the expiration of the said period the United States will convey the same, by patent to said Indian, or his heirs as aforesaid, in fee, discharged from said trust, and free of all charge and incumbrance whatever. Provided, That the President of the United

States may, in his discretion, extend the said period by a term not exceeding ten years; and if any lease or conveyance shall be
93 made of said lands, or any contract made touching the same, before the expiration of the time above mentioned, such lease, or conveyance or contract shall be void."

Did the United States Government mean what it said in its written instrument as above set out? We think so, and if so, neither Hin-Tun-Ka-Sau, or Weasel, nor his heirs could alienate or part with that title; until the period of limitation, twenty-five years, which condition and limitation we contend runs with the land and not with the person, no merchantable title could be conveyed through Weasel or his heirs.

The Courts have repeatedly held that these trust patents convey only possessory title and the fee title remains in the government. As was well said by Mr. Justice Miller, of the United States Supreme Court in the case of United States vs. Kagama, et al., 118 U. S. 375.

"Following the policy of the European governments in the discovery of America towards the Indians who were found there, the Colonies before the Revolution, and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed, and hunted, and established occasional villages. But they asserted an ultimate title to the land itself, by which the Indian Tribes were forbidden to sell, or transfer
94 it to other nations or peoples, without the consent of this paramount authority. When a tribe wished to dispose of its land or any part of it, or the State or the United States wished to purchase it, a treaty with the Tribe was the only way in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as Nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far, not brought under the laws of the United States, or of the State within whose limits they resided."

In the case of Beecher vs. Weatherby, 95 U. S. 525, the Supreme Court of the United States said:

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the
95 occupancy of the Indians; that occupancy could only be interfered with by the United States.

An interesting case covering this point, and which involved the title to lands which were allotted the same as the land in controversy, to certain Indians in a reservation opened under the provisions of the act of Congress of February 8th, 1887 (24 Stat. at L. 389, Chap. 119) is the case of United States vs. Rickert, 188 U. S. 432, decided by the United States Supreme Court February 23rd, 1903. This is a

case where the County Treasurer of Roberts County, S. D., was attempting to collect certain taxes levied on improvements on lands allotted to Indians on the Sisseton & Wahpeton Indian Reservation, the Indians holding trust patents to the lands the same as to the one held in this case by Hin-Tun-Ka-Sau, or Weasel. This is a similar case to the one at bar, and we respectfully call the attention of this Honorable Court particularly thereto.

In that case the Court held:

"A state cannot tax lands allotted to Indians in severalty, under the Act of February 8th, 1887 (24 St. at L. 389, Chap. 119) the 5th section of which requires the United States to hold such lands in trust for the allottees for twenty-five years, when, unless the time shall be extended by the President, they shall be conveyed free from
96 any charge or incumbrance, and declares that any conveyance thereof, or any contract touching the same, before the expiration of such period, shall be absolutely null and void.

"Permanent improvements on lands allotted to Indians in severalty, under the act of February 8, 1887, (24 St. at L. 389, Chap. 199) the 5th section of which requires the United States to hold such lands in trust, for the allottees for twenty-five years, and then, unless the time shall be extended by the President, convey the fee, free from any charge or incumbrance, cannot be taxed by a state as personal property.

In its opinion, the Court said:

"By the act of Congress of February 8th, 1887, Chap. 119, referred to in the certificate, and known as the general allotment act, provision was made for the allotment of lands in severalty to Indians on the various reservations, and for extending the protection of the laws of the United States and territories over the Indians. To that end the president was authorized, whenever in his opinion, a reservation, or any part thereof, was advantageous for agricultural or grazing purposes, to cause it or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot the lands in the reservation in severalty to any Indians located thereon, in certain quantities specified in
97 the statute—the allotments to be made by special agents appointed for that purpose, and by the agents in charge of the special reservation on which the allotments were made, 24 St. at L. 388, 389, 390.

"What interest, if any, did the Indian allottee acquire in the land allotted to him? That question is answered by the 5th section of the allotment act, which provides: 'That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of the said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust, and free of all

charge or encumbrance whatsoever. Provided that the President of the United States may in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted, as herein provided, or any contract made touch-
98 ing the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. Provided, that the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed or delivered, except as herein otherwise provided * * *." 24 St. at L. 389, Chap. 119.

"The word 'patents' when it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The 'patents' here referred to (although the word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years, the United States would hold the land allotted, in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of such period—unless the time was extended by the President—convey the fee, discharged of the trust free of all charge or encumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing improperly called a patent, show-
ing that at a particular time in the future, unless it was ex-
99 tended by the President, he would be entit-ed to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration of the statute that any conveyance of the land, or any contract touching the same, while the United States held the title in trust should be absolutely null and void. So that the United States retained its hold on the land allotted for the period of twenty-five years after the allotment, and as much longer as the president, in his discretion, should determine.

"The Bill, as appears from the certificate of the judges, shows that the lands in question were allotted 'under the provisions of the agreement of December 12th, 1889, as ratified by the act of March 3rd, 1891, and more particularly under No. 5 of the general allotment act approved February 8th, 1887.' Upon inspection of that agreement, we find nothing that indicates any different relation to the United States of the allotted lands from that created or recognized by the act of 1887. On the contrary the agreement contemplates that patents shall issue for the lands allotted under it 'upon the same terms and conditions and limitations as is provided in No. 5 of the Act of Congress approved Feb. 8th, 1887.' 26 St. at L. 1035, 1038, Art. 4."

"The title to Indian lands which is vested in Indian tribes
100 is the right of occupancy. The ultimate fees is in the United States." Mille Lac Band of Chippewas vs. United States, 46 Ct. Cl., 424.

In the case of Beck vs. Flournoy Live Stock & Real Estate Com-

pany, 65 Fed., page 30, Justice Thayer, in discussing the powers of Indians to sell or lease their allotted lands, said:

"It is manifest, we think, from an inspection of the various acts to which reference has been made above, that Congress did not intend to authorize, and has not in fact authorized, the members of Indian tribes to whom allotments have been made in severalty, under the acts of February 21, 1863, and the act of February 8, 1887, to lease, or otherwise dispose of their right to use and occupy the lands allotted to them. * * * These limitations on the power of the Indians to sell or make contracts respecting land that might be set apart to them for their individual use and benefit were imposed to protect them from the greed and superior intelligence of the white man. Congress well knew that, if the wards of the nation were placed in possession of real estate and were given the capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several
101 holdings, and that, instead of adopting the customs and habits of civilized life, and become self supporting, they would speedily waste their substance, and very likely become paupers. The motive that actuated the law maker in depriving the Indians of the power of alienation is so obvious, and the language of the statute in their behalf is so plain, as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatever in lands situated within Indian reservations that might be allotted to Indians."

In the case of Williams vs. Steinmetz (Okla.), 82 Pac., 986, the Supreme Court of Oklahoma referring to the title held by Indians under trust patents to lands allotted to them, said:

"It will be seen that the titles to those lands shall be held in trust for the allottees for a period of twenty-five years, in the manner and to the extent provided for in the act of Congress referred to in the section just quoted, which is 24 Stat. 389, c. 119, No. 5, which says 'That upon the approval of the allotments provided for in this act, by the Secretary of the Interior, he shall cause patents to be issued therefor, in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted, for the period of twenty-five years in trust,
102 for the sole use and benefit of the Indian to whom such allotment shall havve been made, or, in case of his decease, of his heirs according to the laws of the State or territory where such land is located, and that at the expiration of the said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust, and free of all charge or incumbrance whatsoever. Provided; that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.' The making of the lease in question was plainly a violation of the statute. It was a 'contract

made touching the land' and 'conveying the same' within the spirit of the law, and therefor null and void."

The case of Jackson vs. Thompson, et al., (Wash.) 80 Pac. 454, is a case in point. In that case, the Court held:

"A restriction on alienation in a deed of the United States to the Indian wards, pursuant to the treaty stipulations made between the government and the Indians, is valid."

"A deed by the United States to an Indian ward forbid-
103 ding alienation deprives the grantee of the power to dispose of the property by will."

In its opinion the Court said:

"It is the contention of the respondents that the language of the patent is conclusive that the estate was a fee simple, with a limitation upon alienation only during the life time of the patentee; that the limitation was purely personal, and did not run with the land; and it is contended that the granting clause, standing alone, would undoubtedly convey a fee-simple estate as an estate of inheritance, but that, in any event, the habendum strengthens the granting clause, viz: the words, "To have and to hold the said tract of land with the appurtenances unto the said Kudscha-ons, or John Puyallup, as the head of the family, as aforesaid, and to his heirs forever" and that he therefore had, by the habendum a fee simple estate. But the respondents do not quote all the habendum clause. In fact, the very portion, viz: the words added onto the word "forever'—with the stipulation aforesaid—are the words which make the controversy in this case, for the expression 'with the stipulation aforesaid' has reference undoubtedly to the stipulation in the granting clause 'that the said tracts shall not be aliened or leased for a longer term
104 than two years, and shall be exempt from levy, sale or forfeiture, which shall continue, etc.'

In its opinion the court further said:

"The Indians are wards of the government. These arrangements and provisions are provisions in their interest and by their consent, as indicated in the solemn treaties executed. The government, from the necessities of the case, in consideration of the inexperience of the Indians, was compelled to insert these provisions in deeds, which it issued to them, to prevent them from becoming the prey of sharpers and speculators, who would, for an insufficient consideration, obtain their lands, the ultimate result being that the Indians would become pensioners on the government; and the mutual interests of the Indians and the government demanded some such regulations. It was certainly within the power of the government to place any restrictions upon the deeds which it issued to the Indians, which it saw fit. It is insisted by the respondents, as an argument against the continued restriction, that, as the heirs of the Indians increase, the restrictions would become burdensome and impractical; but this is a condition which is within the power of the general government to relieve whenever the necessity arises."

105 The case last above cited, Jackson vs. Thompson, is a recent case, having been decided by the Supreme Court of Washington April 13th, 1905. The case is squarely in point with

the case at bar, and we call the attention of this Honorable Court especially to it. The same question involved in the case of Jackson vs. Thompson, supra, was passed upon by the same Court in an earlier case—Bird vs. Winyer, 64 Pac. 178, and in the case of Jackson vs. Thompson the Supreme Court cites that case with approval. In the case of Bird vs. Winyer, the court held that nothing passed by the patent isued to the Indian by the government except the right of possession and occupancy of the land described; that the absolute fee remained in the government, and hence, upon the death of the wife of the Indian to whom the patent was issued, no rights would pass by inheritance to the children of the wife by a former marriage. In the course of its opinion, the court said:

"So that it is clear that the grantees under the patent obtained only the possession and right of occupancy of the lands described. There was simply a defeasible title conveyed, and that is the condition of the estate at the present time. When Mary Biard died (in that case it was claimed that the heirs of Mary Bird by a former husband were entitled to the land) no greater estate was created
106 thereby, and the only remaining member of the family might at any time forfeit all right to the possession by failure to occupy and till a portion of the lands, or by roving from place to place. Admitting, therefore that Mary Bird took an equal interest with George Bird (her last husband) at the date of the patent, she took only the right to occupy and till the premises while the family lived upon the same. At any event, at her death, she left no greater interest than the right of her heirs to occupy and till the premises. These heirs, not being members of the family, took no interest in the estate."

The Supreme Court of the United States in the case of McKay vs. Kllyton, reported in 204 United States Rep. 457 held:

"State courts were not given jurisdiction of controversies necessarily involving a determination of the title, and incidentally, of the right to the possession, of Indian allotments while the same were held in trust by the United States, by the provision of the act of August 15, 1894 (28 Stat. at L. 286, Chap. 290) delegating to the Federal Circuit Courts the power to determine such questions, since the purpose of that act to continue the exclusive Federal control over disputes concerning allotments which, prior to that act, could only have been decided by the Secretary of the Interior, is mani-
107 fested by its provisions that a judgment or decree in any such controversy shall be certified by the court to the Secretary of the Interior, and by the provision of the act of February 6, 1901 (31 Stat. at L. 760, chap. 217) that in such suits "the parties thereto shall be the claimant as plaintiff and the United States as party defendant."

The Supreme Court of this State, in the case of Minder, Sheriff, vs. First National Bank of Sisseton, S. D., decided Feb. 5, 1908, and reported in 114 Northwestern Rep. page 1094 held:

"Members of the Sisseton Band of Sioux Indians allowed to take lands in severalty under the contract between them, and the United States are still wards of the government, which had the right to

impose such terms and conditions as to the proceeds of the sale of the lands as it might deem proper, and most conducive to the welfare of the Indians."

"Their (Indian) title is a perpetual right of possession and occupancy, the fee remaining in the United States or in the State where the land is situated, as successor to the rights of the European discoveries." Cyc. Vol. 22, page 123, and cases there cited.

A white man cannot acquire any title from Indians by purchase.

Cyc. Vol. 22, page 127.

108 Turner vs. Gilliand (Ind. Terr.), 76 S. W., 253.
Hockett vs. Alston, 58 S. W., 675.
Case vs. Hall, 46 S. W., 180.

A sale of tribal lands under execution is void unless specially authorized by act of congress.

Cyc. Vol. 22, page 129.
Hasting vs. Whitmer (Ind. Ter.), 51 S. W., 967.
Pound vs. Pullen (Tenn.), 3 Yerg., 338.

Lands secured to Indians by treaty cannot be taxed for any purpose by the State in which they lie.

Cyc. Vol. 22, page 130; and cases there cited.

"Where tribal Indians have been assigned lands and reservations as places of domicile, they have no vested rights therein, but simply a right to occupy at the will of the government."

Lone Wolf vs. Hitchcock, 187 U. S., 553.

In the case of Nelson vs. John, reported in the 86 Pac. Rep., page 933, the Supreme Court of Washington held:

"Restrictions placed by act of Congress upon the alienation by Indians of lands allotted to them in severalty, and embodied in the patents for such lands, are pursuant to a general and beneficient policy of the government for the protection of the Indians, and are valid.

109 "Restrictions upon alienation contained in the patents issued to Indian allottees of lands in severalty, as required by acts of Congress, were not repealed by Act of 1887, 24 Stat. 388, c. 119, conferring citizenship on such Indians, and making them subject to the laws of the State in which they reside."

The same court, in a later case, Starr vs. Long Jim, reported in the 100 Pac. Rep., page 194, said:

"An agreement between the United States and Indian chiefs providing for the allotment of land to Indians in the possession and ownership of which they should be guaranteed and protected was ratified by Act Cong. July 4, 1884, c. 180, 23 Stat. 79; providing that the Secretary of the Interior should cause the quantity of land stipulated in the agreement to be allowed the Indians, which, when selected, should be held for their exclusive use and occupation. Act Cong. March 3, 1905, c. 1479, 33 Stat. 1048, authorized the issuance of patents to Indians for the lands previously allotted. Held: that

under the agreement and the Act of 1884, when considered in connection with the Act of 1905, the Indians to whom lands were allotted acquired a mere right of possession, and the legal title remained in the United States until after patent, and an Indian allottee
110 was without authority to convey the land or divest himself of the ownership and possession thereof before the issuance of patent."

Our Supreme Court, in a recent decision, Colombe vs. Wilson, reported in the 135 Northwestern, page 668, decided April 2, 1912, held:

"Since a contract by an Indian to convey land which the United States holds in trust for him is absolutely void, he need not return any consideration received by him, in order, after securing his final patent, to obtain a decree adjudging that the other parties to the contract have no interest in the land; the rule which requires a return of the consideration only applying where a part of the contract is legal."

We think the citation of further authorities unnecessary to show that the title held by Indians to the land allotted to them, is merely possessory, the fee of which is in the United States; being merely a possessory title, it was inali-able. The reason why a possessory title only was given to the Indians, is obvious after reading the authorities heretofore cited. The Indians were, at the time of the passage of the "general allotment act," as it is generally called, on May 8, 1887, and still are, to quite a degree, wards of the government, whom the government looks out for; to prevent their selling
111 their lands at an inadequate or nominal price to the white men, and becoming pauperized by his greed and rapacity, these provisions were made, and inserted in all these patents issued to the Indians. That the provision that the land allotted to Hin-Tun-Ka-Sau, or Weasel, should be inalienable for twenty-five years was put in the patent issued to him, can be ascertained by an inspection of a copy of the patent attached to the abstract introduced by defendants, defendant's Exhibit "2" G. M. H. The provision in said Trust Patent is as follows:

"That the United States of America, in consideration of the premises and in accordance with the provisions of the eleventh section of said act of Congress of the 2nd March, 1889, hereby declares that it does and will hold the land thus allotted (subject to all the restriction and conditions contained in said eleventh section) for the period of twenty-five years, in trust for the sole use and benefit of the said Hin-Tun-Ka-Sau, or Weasel, or in case of his decease, for the sole use of his heirs according to the laws of the State or Territory where such land is located and at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. Provided, that the Pres-
112 ident of the United States may, in his discretion, extend the said period by a term not exceeding ten years; and if any lease or conveyance shall be made of said lands, or any contract made

touching the same before the expiration of the time above mentioned, such lease, or conveyance or contract shall be void.

What language can be plainer than that? The Patent is dated December 12th, 1895, and under the plain wording of the patent the time in which the land could be alienated by Weasel would not expire until 1920. The testimony in the case shows that Weasel died, and that his estate was probated in Buffalo County, South Dakota, in the year 1908, the Final Decree of Distribution being made on October 12th of that year. The deed from the purported heirs of said Hin-Tun-Ka-Sau, or Weasel, was signed and acknowledged October 9th, 1908. Then the question arises: Can the heirs of Weasel give a good title, if Weasel could not? We think it will be conceded that Weasel, had he lived, could not have given good title to this land before the expiration of said twenty-five years. Appellant contends that the heirs could give no better title than Weasel could have given had he lived: The restriction on alienation was not merely personal to Weasel, but ran with the land, being
113 embodied in the instrument upon which the title was based. That is the reasonable rule, and is the law.

See:

Jackson vs. Thompson, (Wash.), 80 Pac. 454.
Bowling vs. United States, 191 Federal, 19.
Goodrum vs. Buffalo, 162 Fed. 817.

We have carefully examined all the above cited cases, and in each of them the statute under the authority of which the patent was issued, and the recitals in the patent, are the same as in the case at bar. In the case of Goodrum vs. Buffalo, supra, the Circuit Court of Appeals for the Eastern District of Oklahoma said:

"The language of the act and patent could not have been more exact and clear, to express the purpose and policy of the government to deny the power and right of these allottees to dispose of the lands in any manner until after the stated period of 25 years. As the greater includes the lesser, no contract, agreement or obligation in form entered into by the allottee or his heirs within the limitation period could possibly have the effect to operate as, or result in, a transfer of the title to these lands."

Such being the case, we fail to see how the purported approval of the Secretary of the Interior in the year 1909, nearly a year after the heirs of Weasel had transferred this land to R. J. Huston,
114 as appears from transfer No. 2 of the abstract, Exhibit "2" G. M. H. Appellant contends earnestly that such approval was of no force or effect, and not based upon any statutory authority. Further than this, the "general allotment act" of May 8, 1887, while it imposed the restriction on alienation for said period of twenty-five years, did not provide that the president, or any one else could shorten the term, or change it, although it provided that the president could in his discretion, lengthen the term. That was the restriction imposed in the patent, and the Indian took it with that understanding, and by accepting it, he acquiesced in its provisions, completing a contract, as it were. The granting of citizenship and the protection

of the laws to the Indian would not have the effect of removing the restriction:

Nelson vs. John, (Wash.), 86 Pac. 933.
Frazee vs. Spokane Co. (Wash.), 69 Pac., 779.
United States vs. Fluornoy L. & R. Co., 69 Fed. 886.
Pilgrim vs. Beck, 69 Fed. 895.
Beck vs. Flournoy Real Estate Co., 65 Fed. 30.

This brings us to the discussion of the second question in the case: Was a good and sufficient warranty deed ever tendered by respondent to appellant for the premises in controversy, in accordance with the provisions of the contract for the sale thereof, entered into
115 between plaintiff and appellant, and defendant and respondent on April 15th, 1911?

On said 15th day of April, 1911, appellant George W. Egan and respondent Chas. S. McDonald, entered into a contract of sale for the premises, the title to which is in controversy, which contract, marked Exhibit "E" was admitted in evidence, and is set forth in full in the abstract. Despite the recitals in the contract, it is undisputed that $1,000.00 in cash was paid at the time the contract was executed. In said contract it is recited:

"Three Thousand Dollars ($3,000.00), to be paid on or before the first day of March, 1912. Abstract showing good, merchantable title to be furnished, and a good, sufficient Warranty Deed to be delivered when payment of $3,000.00 is made, Settlement to be made at Sioux Falls Sav. Bk."

Defendant never made a tender of good and sufficient Warranty Deed, or of any deed to the plaintiff at any time, and so testified on page 12 of the transcript, and did not tender one on March 1st, 1912, the time fixed for the closing of the deal by the contract, Exhibit "E" (transcript page 12) although plaintiff advised defendant about February 25th, 1912, that he had mortgaged some Iowa
116 land, and was ready to turn the balance of the money over to defendant when he furnished a merchantable title (Transcript, page 14) which testimony is undisputed. Again, a short time after plaintiff had his conversation with defendant McDonald about February 25th, 1912, he had a further talk with said defendant in which he again advised him (defendant) that he was ready to close up his deal, but defendant McDonald asked for a little more time in which to fix up the title, and said "You give me a little time to fix it up; I want to have Harry Judge write down to Washington. He said he would write down to see if he could fix the title up." On being advised by plaintiff in that conversation that he (plaintiff) was ready to close the deal replied "You don't need to bother about getting the money ready now because there is a defect in the title, and I have got to fix that up first." (Transcript, page 15.) The testimony also shows that a short time after the second conversation Mr. Egan, this plaintiff, had a third conversation about the 12th or 15th of March, 1912, in which plaintiff again asked about the abstract, and again advised defendant McDonald that he was ready and anxious to close this deal, and again about the 1st to the 5th of

April, 1912, another conversation was had between plaintiff Egan and defendant McDonald, at the former's office at which the
117 question of title was again gone into, Mr. Egan saying to Mr. McDonald "Mac, aren't you ever going to furnish me a merchantable title to that land?" to which defendant McDonald replied "I don't know what to do. I cannot fix it up." Plaintiff then stated, that he had had one thousand dollars of his money since April 15th, 1911, and had never furnished any title and that he (defendant) admitted he hadn't any. (Transcript, page 16). It is not denied that plaintiff made several demands on defendant for his money, the last one being about a week before the suit was commenced, the suit being commenced on June 18th, 1912. (Transcript, page 17.) The evidence also shows that plaintiff made a written demand on defendant on March 12th, 1912, Exhibit "D," which defendant admitted receiving. (Transcript, page 12.)

It is difficult to see how plaintiff could have done more.

We feel that this Court must come to the inevitable conclusion that plaintiff below, appellant here, did everything in his power to comply with and carry out his part of the contract. The record shows without dispute that he had taken steps and gone to considerable trouble to have the balance of the money ready on March 1st, 1912, and was on that date, ready, able and willing to comply with his part of the contract.

118 It must, with equal certainty, appear to this Court, that at that time defendant below, respondent here, was not possessed of a merchantable title to the land in controversy. Nor will the Court, we feel, overlook the fact that little or nothing was done by the defendant in an effort to perfect this title. But in this the defendant may have reached the conclusion, as we believe he did, after consulting Harry E. Judge, a recognized authority on titles, that it was impossible for him to place himself in a position where he could be possessed of a merchantable title to this land.

We feel also that the Court must recognize that plaintiff was patient and long suffering. On the 15th day of April, 1911, plaintiff paid to defendant, McDonald, One Thousand Dollars in cash. This money McDonald had kept from that day to this. On March 1st, 1912, and both before and after that date, as the undisputed record shows, demands for either the perfection of the title or the return of the money were made by plaintiff. The record discloses and the defendant McDonald's testimony shows that these demands and requests be treated with silent contempt. Finally, plaintiff brought this suit on June 18th, 1912, over a year after defendant, McDonald, had received plaintiff's One Thousand Dollars, and used the same for his own benefit.

119 We feel positive that this Court must, in view of the facts as disclosed by the record, find that defendant McDonald, never, at any time, until long after suit was begun, pretended to furnish a deed to this land to plaintiff, and in this connection, the inevitable conclusion must follow, under the facts and the law applicable thereto, that defendant had no title that he could furnish to

plaintiff, and that plaintiff is entitled to have his money returned, with interest thereon from this defendant.

Assignments of Error.

We think the Court erred in overruling plaintiff's objection to, and admitting in evidence Defendant's Exhibits "2," "3," and "A"; Exhibit "2" being the abstract of title to the land in controversy containing the first four transfers, the certificate of continuation, and attached thereto, the Abstracter's Exhibit "A" which is the same as Defendant's Exhibit "3," said Exhibit "3" being a copy of the purported decree of the County Court of Buffalo County, South Dakota, which purported to decree the lands in controversy to the pretended heirs of Weasel, mentioned therein. Exhibit "A" was another abstract to the same premises, but merely containing the first two transfers shown in Defendant's Exhibit "2" and the abstracter's certificate, and the caption sheet. Plaintiff objected
120 to the introduction of these exhibits in evidence on the ground they were incompetent, irrelevant and immaterial and we urge the objection at this time. The title as shown by both these abstracts, Exhibits "2" and "A" were both based upon an Indian Trust Patent, which, as we have heretofore shown in this brief confers merely a possessory title on the Indian, while the fee remains in the government. It is shown by the testimony in this case that the patent was issued in the year 1895, and under the very terms of the patent itself, fee title would not be given to Hin-Tun-Ka-Sau, to whom it was issued or to his heirs, for 25 years, which will not expire until 1920. Exhibit "3" attached to the abstract Exhibit "2" was incompetent, irrelevant and immaterial, for the reason that it was a pretended decree of the County Court of Buffalo County, S. D., purporting to decree this land to the pretended heirs of Weasel, and the County Court in this case, had no jurisdiction to determine heirship.

United States vs. Pahe, Fed. case No. 16,014.
United States vs. Shanks, 15 Minn., 369.
McKay vs. Kalyton, 204 U. S., 458.
(Plaintiff's specification 1 and 2.)

The trial Court erred in making and entering judgment, on February 19th, 1914, finding that the title to the premises in
121 controversy was good and merchantable, dismissing plaintiff's action and adjudging costs in favor of defendant and against plaintiff. We have heretofore shown in our argument that the title possessed by defendant was simply the title which the Indian Hin-Tun-Ka-Sau had, which, under the law was simply a possessory title, and the fee title was in the government and would be for a period of twenty-five years from the date of the patent, December 12th, 1895, and subject to a further extension of time in which the land would be inalienable, not exceeding ten years, in the discretion of the President of the United States. We think it needs no

further argument than that already made heretofore, to convince this Honorable Court that the position taken by plaintiff and appellant is correct, and that the finding of the trial Court that the title was good and merchantable, should be reversed, and the title held to be simply a possessory title, and hence, not merchantable. (Appellant's assignments 3, 4, 5, and 6.)

Commenting briefly on the insufficiency of the evidence to justify the judgment of the trial Court we have this to observe that the evidence abundantly shows that all the title defendant had on March 1st, 1912, when the transaction was to have been closed, and which plaintiff, on his part was ready, able and willing to close, was
122 merely a possessory title, the same title that the Indian Hin-Tun-Ka-Sau had. That under the law this could not ripen into a fee title until the expiration of twenty-five years specified in the patent, or any further extension of that time the President of the United States might make. The evidence will further show that, although defendant made some slight attempts to fix the title, it was not such a title as he could fix to make it merchantable; that plaintiff was ready, able and willing to close the transaction on March 1st, 1912, and gave the defendant ample time to fix the title; that he only started suit to recover this money when it became evident to him that defendant could not fix the title to make it merchantable, and refused to either make the title good, or return the money. The evidence also shows that demand was made for the return of the money paid before suit was started. (Plaintiff's assignment 8.)

Taking all the evidence in this case into consideration, and the law applicable thereto, which we have heretofore set out in our brief and argument, we think the trial Court erred in rendering the judgment it did in favor of defendant and against plaintiff, and upon plaintiff's motion for a new trial, the Court erred in refusing to grant one. (Plaintiff's assignment 9.)

123 *Conclusion.*

In view of all the facts in this case, and the law applicable thereto, we hold that plaintiff below, and appellant here, is entitled to have a finding by this Court that respondent is not now and never was in possession of a merchantable title to the South Half of Section 21, Township 108, and Range 72, West Fifth P. M., Buffalo County, S. D.; Further, that under all the facts and circumstances of this case, respondent did not comply with his part of the contract in furnishing to plaintiff below, appellant here, Warranty Deed as provided for; that the Honorable Trial Court was in error when it entered judgment for the defendant and against plaintiff, and said Court was also in error in denying appellant a new trial upon his showing and motion therefor.

And that in all things, the orders, rulings, findings and decrees of the lower Court should be reversed and the case remanded. Appellant respectfully gives notice that when this case is called for hearing in this Court, he will desire to be heard orally.

Respectfully submitted,

GEORGE W. EGAN,
Attorney, Pro. Se Se.

124 And afterwards, to-wit, on the 10th day of August, 1914, the original notice of appeal and undertaking was filed in this office; and thereafter, to-wit, on the 1st day of October, 1914, the defendant and respondent, Charles S. McDonald, by his attorneys of record, filed in this Court his respondent's brief, containing amendments to the statement of the record, and supplementary record of the proceedings of the trial court and of the evidence adduced upon the trial, together with proof of service thereof upon the plaintiff and appellant herein. The following is a true and correct copy of said respondent's brief, containing amended and supplementary abstract and statement of the case, as the same appears of record and on file in my office, to-wit:

125 In the Supreme Court of the State of South Dakota, October Term, 1914.

3643.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Appeal from the Circuit Court of the County of Minnehaha.

Hon. Joseph W. Jones, Presiding Judge.

Brief for Defendant and Respondent.

BAILEY & VOORHEES,
Attorneys for Defendant and Respondent.

Supreme Court, State of South Dakota. Filed Oct. 1, 1914. E. F. Swartz, Clerk.

126 In the Supreme Court of the State of South Dakota, October Term, 1914.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Appeal from the Circuit Court of the County of Minnehaha.

Hon. Joseph W. Jones, Presiding Judge.

Brief for Defendant and Respondent.

The defendant and respondent thinks that the statement of the contents of the settled record made by the plaintiff and appellant in

his brief is incomplete in some particulars and, therefore, makes the following additional statement of the contents of the settled record, which he deems to be fair and necessary to make the statement herein to this Court complete.

127 *Additional Statement.*

To the following question asked the witness, E. E. Pierson, for the plaintiff on direct examination, "What objection could be legally made to the title?" (Question 19 on page 14 of the Record, folio 27 of brief of plaintiff) the defendant objected on the ground that the question called for the conclusion of the witness and was incompetent and immaterial, which objection was overruled and an exception thereto allowed. After the witness answered the question, as shown on page 14 of the record, at folio 27 of the brief of plaintiff, the defendant moved to strike out the answer for the reasons stated in the objection, and because the witness had not shown himself qualified, which motion was overruled and an exception allowed.

To the question asked the witness, E. E. Pierson, for the plaintiff on direct examination (Question 25 on page 16 of Record, Folio 31 of brief for plaintiff) "Did Mr. McDonald ever tender to you a deed and abstract to that land prior to or before this suit was filed?" The defendant objected on the ground that the question was incompetent, immaterial and irrelevant, which objection was overruled and an exception allowed; and to the next question asked the witness, Pierson, on direct examination, to-wit: "Did he (referring to the defend-
ant) ever tender to Mr. Egan in your presence or offer to Mr.
128 Egan in your presence or leave with you at Mr. Egan's office
a deed to this land:" (Question 26 on page 16 of Record, Folio 32 of brief of plaintiff) the defendant objected on the ground that the question was incompetent, immaterial and irrelevant, which objection was overruled and an exception allowed.

In connection with the cross-examination of the witness, E. E. Pierson, appearing at folio 35 of the brief of plaintiff, should be inserted the following questions and answers, appearing on page 18 of the settled record.

"Q. 24. At the time he (Mr. Egan) told you to serve this notice " of rescission, did he not also say substantially that he did not " believe that he had a good bargain and for that reason he wanted " to be relieved from his contract?

"A. Mr. Egan did not make such a statement.

"Q. 25. Did he not make a statement to that effect then, at a later " time or at an earlier date?

"A. He did after I had written my opinion on the abstract.

"Q. 26. Will ask you if it is true that Mr. Egan expressed a desire " to you that you reject the title to the property in question?

"A. He did not before the opinion was written.

"Q. 27. After the opinion was written he did so express a desire?

"A. He stated that this title had the same defect that the
129 " title to the Johnson Land had and that he did not wish me
" to approve the same."

To the reception in evidence of plaintiff's exhibit "B", (folio 38 of brief of plaintiff), which was a purported opinion of the witness, E. E. Pierson, upon the second abstract of title, defendant's exhibit "2", submitted by defendant to plaintiff, the defendant objected (Record, page 20) on the grounds that said exhibit "B" is incompetent, immaterial and irrelevant, that it is a purported opinion upon the abstract of title involved in the action signed by the witness, E. E. Pierson; that said E. E. Pierson has not shown himself a qualified examiner of abstracts or titles to lands in Buffalo County, South Dakota, and that the opinion is not well founded in law, which objection was overruled and an exception allowed. The court stated that the exhibit was admitted as a communication between the parties (Record, page 20). The plaintiff in his statement in his brief copies only about a quarter of said exhibit "B". Said exhibit, which appears in full at page 70 of the record, is as follows:

"Opinion.

"From the Law Offices of George W. Egan, Sioux Falls, South "Dakota.

"This Opinion has been personally approved by Mr. Egan before " being sent out. It embodies the law and may be relied
130 " upon. The opinion is based upon the assumption that all " the facts have been truthfully and fully submitted.

"Subject."

"In the Matter of the S. ½ of Sec. 21-Twp. 108-R. 72 in Buffalo County, S. D.

"Mr. GEO. W. EGAN: At your request I have made a further and " more careful examination of the title to the South Half of Sec. " 21-Twp. 108 N., R. 72 West in Buffalo County, S. D., as the same " is disclosed by the attached abstract consisting of four transfers. " Exhibit "A" and the certificate of Dve & Hill, abstracters, dated " March 7, 1912, at *at* 10 A. M. and find in conjunction with my " previous opinion rendered on the same title, as follows:

"That on December 12, 1895, the United States Government issued " to its Ward. Hin-Tun-Ka-Sau or Weasel, a Trust Patent for the " above described lands. Such patent conferred on Weasel a pos- " sessory right only while the legal title to said lands was retained " by the Government. After the death of Weasel, his heirs, under " and by virtue of his said Trust Patent might divest themselves of " their equitable title in said lands by an Indian Inheritance Deed " and upon its approval by the U. S. Government through its Secre- " tary of the Interior the legal title as well would pass into their " grantee.

131 "At transfer No. 2 an Indian Deed, executed by pretended " heirs of Weasel, is set forth. It appears on the face of this " deed that the Chief Clerk to the Commissioner of Indian Affairs

" recommended that this deed be approved by the Secretary of the " Interior, which approval was duly made by the Ass't Sec'y of the " Interior under date of March 2, 1909. In recommending and ap- " proving this deed the only question considered by the officers was " with reference to the adequacy of the consideration, it being their " duty to protect the Wards of the Government from being defrauded " out of their lands. It is evident, therefore, that the approval of this " deed had none of the characteristics nor the binding force and effect " of a judicial finding or decree but was a ministerial act only, find- " ing nothing and binding no one.

"At transfer No. 4 is set forth a Final Decree of Distribution of " Weasel's estate, made by a State Court, attempting to distribute the " lands in the Caption to certain persons named as the 'Sole heirs' " of Weasel. This the State Court had no authority to do for two " reasons:

"First. Weasel was a tribal Indian and State Courts cannot ad- " minister upon their property or credits:

"United States vs. Pahe, Fed. Case No. 16,014 holds as fol- " lows:

132 " Without the assent of the General Government the State " Probate Courts can not administer upon the property or " credits of Indians who are members of a tribe which maintained " toward the United States its tribal relations.

" United States vs. Shanks, 15 Minn. 369.

" A Probate Court, the territorial jurisdiction of which may ex- " tend over an Indian reservation, has no jurisdiction to administer " upon the estate of an Indian a member of the tribe to which such " reservation belongs, and residing thereon.

"Second.

" On the death of a tribal Indian his property descends in accord- " ance with the customs of his tribe and not in accordance with the " laws of descent as prescribed by the state code.

" Meeker vs. Kaelin, 173 Fed. 216.

" Y-Ta-Tah-Wah vs. Rebock, 105 Federal, 257.

" On the death of a tribal Indian residing upon a reservation, his " property does not become subject to the laws of distribution of the " state in which the reservation is situated, but descends in accord- " ance with the custom of his tribe; and hence the Courts of the State " have no jurisdiction to appoint an administrator for his estate, " there being no property within its jurisdiction to be administered.

" Decided in 1900 by U. S. C. C., Iowa.

" A State Court has no jurisdiction of a controversy neces- 133 " sarily involving a determination of the title, and inci- " dentally, of right of possession of Indian allotments while " the same are held in trust by the U. S.

" McKay vs. Kaylton, 204 U. S. 458. Decided in February, " 1907.

" I must repeat myself by saying that it is a well settled rule of law " that 'Whoever deals in inherited Indian Lands does so at his own " risk.' Therefore I can not advise you to assume the same risk that " R. J. Huston assumed and probably took into consideration when " purchasing this land from the Indians at about $5.00 per acre.

" Respectfully Submitted,

"E. E. PIERSON."

In the answer of the witness, George W. Egan, the plaintiff, appearing at page 24 of the record, shown at folio 53 of the brief for plaintiff, it should appear, as the record shows, that the witness stated that Mr. Pierson was his "office man."

To the question asked the witness, George W. Egan, on direct examination, to-wit: "Did you in any of these conversations you testified to having with Mr. McDonald, explain to him the defects to this title?" (Record, page 26, Folio 61 of brief for plaintiff), the defendant objected on the grounds that the question was incompetent and immaterial, that the witness had not qualified himself as an
134 expert, and that the witness had not qualified himself as an examiner of abstracts of land in Buffalo County, South Dakota, in which Indian titles, as the witness says, are involved, which objection was overruled and an exception allowed.

To confirm to the record (page 27) the answer of the witness to that question, appearing at folio 61 of the brief of plaintiff, should be corrected as follows: After the word "through" in the fourth line of the answer in the brief should be inserted the words "the abstract and through" and for the words "in trust" in the seventh line of the answer in the brief at folio 62, should be substituted the word "down."

To the question asked the witness, George W. Egan, on direct examination "You may state to the jury how that memorandum came to show $200 paid when you paid $1,000," (the last question on page 29 of the record, folio 70 in brief of the plaintiff) the defendant objected on the ground that the question was immaterial; that the contract (being a memorandum or contract for the sale of the property previously testified to by the witness and being plaintiff's exhibit "E" shown at folio 71 of the brief for plaintiff and at page 74 of the record) speaks for itself and it is admitted that $1,000 was paid, which objection was overruled and an exception allowed.

To the reception in evidence of exhibit "F" shown at page
135 74 of the record and at folio 75 of the brief for the plaintiff, the defendant (page 30 of Record) objected unless the abstract referred to in it accompanied it, which objection was overruled and an exception allowed.

To conform to the record (beginning with the last question on page 39 of the record) the answer of the witness, George W. Egan, appearing at folio 106 of the brief for plaintiff should be corrected by inserting before the word "Exhibit" in the second line of folio 107 of the brief the word "of."

To conform to the record there should be inserted at the close of the first line of the folio 108 of the brief for plaintiff, the following ques-

tion asked the witness, George W. Egan, and the answer thereto appearing on page 40 of the record.

" Q. In that connection I call your attention to exhibit 'B,' the " second opinion of Mr. Pierson and particularly the last paragraph " on page 2, and ask you after refreshing your memory from that " paragraph, if you did not see that certified copy of it?

" A. I may have seen that or a copy of it. You have got two ab- " stracts here."

At folio 124 of brief for plaintiff it should appear that the copy of exhibit "3" G. M. H. there copied and shown on page 86 of the record, is the same as exhibit "A" (mentioned at said folio 124) in connection with entry No. 4 of the abstract of title, which abstract is exhibit "2" G. M. H.

136 For the following sentence, "He (referring to the defendant) told me he did not want to pay me any money until he gave me a merchantable title, and that he would proceed to do so," appearing in the answer of the witness, George W. Egan, as printed at folio 146 of the brief for plaintiff, should be substituted, to conform to the record, (the last answer on page 41 of the record) the following, "He told me he did not want me to pay him any money until he gave me a merchantable title, and that he would proceed to do so."

After the words "plaintiff rests" in folio 146 of the brief for plaintiff should be inserted the following, appearing at page 42 of the record:

Defendant moves the court to dismiss this action and to direct a verdict for the defendant for the reason that the plaintiff has not shown, as he would be required to do by the contract of sale, exhibit "E," that he had tendered to the defendant the balance of the purchase price of the property and demanded a conveyance of the character called for by the contract; further because it appears from the testimony that the title to the property as shown by these portions exhibit "2" G. M. H. (the abstract of title) tendered to the plaintiff in March, 1912, was a merchantable title, as called for by the contract, which motion was overruled and an exception allowed.

137 Following the question asked the witness, Charles S. McDonald, on direct examination and the objection of the plaintiff thereto and the overruling of such objections shown at folios 149 and 150 of the brief for plaintiff, should appear the answer to such question shown at the top of page 44 of the record as follows:

" A. That contract was made at Mr. Egan's suggestion. He said " he wanted to show these men who were trying to sell him this " land, I think the Johnson Brothers, in their county and his own " home town cheaper than they could sell it and wanted it drawn up " that way so as to show a less amount. I drew up the contract at his " suggestion and he approved of it."

To the testimony of the witness, McDonald, shown at folio 152 of the brief for the plaintiff should be added the following testimony of that witness shown at page 45 of the record, "It was the same envelope in which the Exhibit A, the abstract, was returned to me.

There was no enclosure in the envelope except the abstract and no letter of objection to the title or comment upon it."

Immediately following the statement of the witness, McDonald—"I did not have a conversation with Mr. Egan some time between the 10th and 25th days of February, 1912," in his testimony shown at folio 154 of the brief for plaintiff should be inserted the following testimony of that witness with reference to such alleged conversation appearing at page 46 of the record.

138 I could not have had any such conversation because I was not in the city at that time. I left on the 11th day of February for Philadelphia. I was a member of the Mint Commission and I returned to Sioux Falls on the 26th day of February. During all that time between the 11th day of February and the 26th day of February, 1912, inclusive, when that alleged conversation was had, I was absent from the city of Sioux Falls and State of South Dakota and did not see Mr. Egan during any of that time. I am positive above these dates.

"Q. After you returned from your trip to Philadelphia on Feb-"ruary 26th what did you do with reference to closing this transac-"tion?

"A. I sent the abstract to have it brought down to date, March "1st, the day of settlement. I wanted the abstract to be continued "to that time and it was sent back to me I think on the first day of "March. I then took the abstract over to Mr. Egan's office and told "him I was ready to settle. He told me then he had not examined "the abstract and wanted further time on it. I left the abstract then "with him again, and in a few days I received the first letter from "Mr. Pierson.

"Q. What did you then do?

139 "A. I took the abstract to Harry Judge with this letter "of objections of Pierson and at his suggestion I telephoned "out for another abstract to be made, the abstract being a short one, "so the second abstract could be returned in a shorter time."

At the end of the testimony of the witness, McDonald, in the first line of folio 157 of brief for plaintiff should be inserted the following testimony of that witness appearing at the bottom of page 47 and at the top of page 48 of the record.

"Q. In other words Mr. Judge took the matter up with a view of "satisfying the objections of Mr. Pierson?

"A. Yes sir.

"Q. Was the matter left for awhile with Mr. Judge then?

"A. Yes sir.

"Q. What was then done by you with reference to the title to the "property after the matter had been with Mr. Judge?

"A. After it had been with him for a while then I took it to the "firm of Bailey & Voorhees.

"Q. Do you know what they did?"

This question was objected to by the plaintiff as being incompetent and immaterial which objection was overruled. It was then further objected to on the ground that the witness had testified that

after the 12th of March he never presented any abstract,
140 which last objection was sustained and exception allowed.

After the following answer of the witness, McDonald, "I did, yes sir," appearing in folio 158 of the brief for plaintiff should be inserted the following appearing at page 48 of the record:

"Q. Was that statement correct?

"A. No sir.

"Q. Did you ever make any such statement to Mr. Egan at any "time or place?

"A. No, I did not.

"Q. Did you hear Mr. Egan testify with reference to a conversa- "tion with you in which he stated that you said that the title could "not be made good?

"A. Yes sir, I did.

"Q. Did you make any such statement?

"A. I did not.

"Q. Did you ever state to Mr. Egan that he need not bother to "deposit the sum of three thousand dollars, the balance of the pur- "chase price for this property, under this contract, with the Sioux "Falls Savings Bank?

"A. I did not.

"Q. Did you make any statement to him to the effect that he need "not perform the contract so far as he was concerned?

"A. No sir, I never did.

141 "Q. Did Mr. Egan ever tender to you the sum of three "thousand dollars, the balance of the purchase price of this "property or any part of it?

"A. No sir.

"Q. Did he ever offer to pay for it?

"A. He did not.

"Q. Did he ever tell you that he disposed of a mortgage of that "amount or some amount on property in Iowa so as to get the funds "with which to perform this contract?

"A. If he did I have no recollection of it."

At the end of the testimony on direct examination of the witness, McDonald, shown at folio 159 of the brief for plaintiff should be added the following testimony of that witness appearing at page 50 of the record: "At that time I told him (Mr. Egan) I was there to "settle and had the deed and abstract. He told me he had not ex- "amined the abstract. I left it there with him. I told him I had "the deed and was there ready to settle. I did not tell Mr. Egan on "March 4th or any other time, that he need not bother about ten- "dering to me the balance of the purchase price of this property "until the title was fixed up."

After the following statement in the testimony of the witness, McDonald, on cross-examination shown at folio 165 of brief for plaintiff,

"I do not remember what the conversation was in particular"
142 should be inserted the following testimony of that witness shown at top of page 52 of the record, "except I do remember "I did not tell you (Mr. Egan) that." And immediately following

the preceding should be inserted the following testimony of the witness, McDonald, appearing at page 52 of the record:

"Q. You have been given to understand right along that you had "no title to this land?

"A. No sir.

"Q. Harry Judge told you that?

"A. No sir.

"Q. That is the reason you took it away from Harry Judge and "went to Bailey & Voorhees, because he told you you had no title?

"A. No sir."

The following statement in the testimony of the witness McDonald as shown at folio 166 of the brief for plaintiff, "After March 1st I "changed my mind about the title," should be stricken from the statement by the plaintiff, as there is no testimony of that character by the witness McDonald shown in the record. Plaintiff in preparing his brief doubtless mistook the following question shown at page 52 of the record for an answer by the witness:

"Q. After March 1st you changed your mind about the "title?

143 "A. There was some defects you pointed out and I wanted "to satisfy you."

Immediately after the preceding should be inserted the following question and answer shown at page 52 of the record:

"Q. You were satisfied after March 1st there was something the "matter with the title?

"A. I was satisfied of some defects in the title in the first ab-"stract."

After the word "comments" in the first line of folio 168 of brief for plaintiff should be inserted the following testimony of the witness McDonald, appearing at the bottom of page 53 and at the top of page 54 of the record, "When I went over to Mr. Egan's office in April "(1911) I left the abstract there and the abstract was in the pos-"session of Mr. Egan from April until July, (1911)."

For the following purported statements in the testimony on cross-examination of the witness McDonald shown in folios 172 and 173 of the brief for plaintiff, "Mr. Egan, when I went to his office on "April 15th, did not say he had not bought the Johnson land; he "said he had had a letter from the Johnson Brothers about the land. "I have told all that was said about the transaction," which statement is incomplete, should be substituted the following from the testimony of that witness shown at page 57 of the record:

144 "Q. I understood you (Mr. McDonald) to state that Mr. "Egan had not yet bought the Johnson land at the time you "came over there on the 15th of April.

"A. I do not believe I stated that.

"Q. What did you say about it?

"A. You told me at that time you were contemplating buying it.

"Q. But hadn't bought it?

"A. You did not say you had or had not, you said you contem-"plated buying it.

"Q. You say the object of putting in two hundred dollars in-
"stead of one thousand dollars was what?
"A. I stated what you told me.
"Q. Tell the jury.
"A. That you wanted to show Johnson Brothers that you could
"buy land in that vicinity so much cheaper at home.
"Q. With the object of putting the price down cheaper than your
"land?
"A. I do not know what your object was.
"Q. I did not tell you that?
"A. No sir.
"Q. But I told you that Johnson Brothers had been up to see
"me about it.
"A. I think you said you had a letter from Johnson
"Brothers.
145 "Q. What else was said there, tell the jury all that was
"said.
"A. In what particular, Mr. Egan?
"Q. Anything else you have not told about this transaction?
"A. I have told about all there was said."

After the following statement of the witness McDonald on cross-examination appearing in folio 175 of the brief for plaintiff, "I don't "think I ever wrote to Mr. Egan or said anything to him in response "to his letter of March 12, 1912," insert the following statement by that witness appearing at about the center of page 60 of the record: "It was in the hands of my attorney at that time, Harry Judge."

At the conclusion of the testimony of James Walkins, a witness for the defendant, shown at folios 176 and 177 of the brief for plaintiff, and before the defendant rested, there should be inserted the following appearing at page 62 of the record:

Defendant offers in evidence Exhibit 6, the same being a certified copy of judgment rendered in an action of Charles S. McDonald, plaintiff, vs. the unknown heirs at law, etc., et al., defendants, in the Circuit Court of Buffalo County, South Dakota, under date of
the 20th day of November, 1912, entered on November 21st,
146 1912, which certified copy was recorded in the office of the
register of deeds of Buffalo County, South Dakota, on the 21st day of November, 1912, in Book 2 of Miscellaneous Records at page 378.

Objected to as incompetent, immaterial and irrelevant for the reason that it is not within the issues here, and it is not material in that it appears on its face to have come from a court without jurisdiction in this case, and not binding upon this plaintiff and does not tend to prove or disprove any issues. It is not claimed and never has been claimed that any tender was made to the plaintiff of the deed or of an abstract after March 12th, and it appears on its face an attempt to bolster up a title they admit they did not have, and it can not bind this plaintiff at this time, and it was brought in after this suit was begun, which objection was sustained and an exception allowed.

Said Exhibit 6 is not inserted at this point as it was attached to

the completed abstract of title to the property, Exhibit 2, G. M. H., as Exhibit D., of that abstract in connection with entry 7 of that abstract, and is hereinafter referred to in connection with said Exhibit 2, to — the defendant hereby refers.

Mr. Voorhees (who is one of the attorneys for the defendant):

147 Now, Mr. Egan, the defendant, Charles S. McDonald, hereby tenders to you an abstract of title to this property, the south half of 21—Section 21, township 108, range 72, Buffalo County, South Dakota, duly continued to date and showing a merchantable title called for by the contract, Exhibit "E" G. M. H. And also tenders to you a deed of the character called for by the contract:

Mr. Egan: To which tender in open court, plaintiff refuses for the reason the defendant has sworn under oath that he never at any time after the 12th of March, tendered this plaintiff or offered to tender him either his money or abstract or deed, and that this plaintiff complied with the law, served written notice which the defendant admits, within a reasonable time, rescinding the contract. And since that time he has otherwise invested his money and brought expense upon himself and been out of the use of his money since the 15th day of April, 1911, and has declared the contract rescinded; that defendant accepted the rescission of the contract by making no effort to comply with the terms of the written agreement; has allowed plaintiff to be without his money and obliged him to go to the expense of bringing this suit; appears from the records we have introduced they have no title and could not get title to this identical land.

The Court: I do not think the court is called upon to make any ruling.

148 Defendant now offers in evidence Exhibit "2" G. M. H., being a completed abstract of title to the property.

Defendant also offers in evidence Exhibit "7" G. M. H., being deed.

Mr. Egan: To all of which offers, the plaintiff objects for the reason the same are irrelevant, incompetent and immaterial to the issues joined; not made in proper time and are not material and for the other and further reasons which we specifically stated, to be extended by the reporter by permission of the court, to the alleged record, No. 6, at the time it was offered.

Objection is sustained. Exception allowed.

Said Exhibit "2" being the completed abstract of title to the property, except that portion thereof which appears at folios 113 to 144, inclusive, of the brief for plaintiff, which portion is by such reference made a part hereof, and which complete exhibit appears at page 75 of the record, is as follows:

149 No. (5).

R. J. Huston, Grantors,

to

Charles S. McDonald, Grantees.

Character of Inst., Warranty Deed.
Date of Inst., May 20th, 1912.
Consideration, $5,000.00.
Date of Filing, May 25th, 1912.
Hour of Filing, 1 p. m.
Record, Book 11, page 31.
Date of acknowledgment, May 20th, 1912.
Before whom acknowledged, John Barton, Notary Public.
Residence of Officer, Minnehaha County, S. Dak.
Seal, Yes; witnesses, No.

Description and Remarks.

Describes the S. ½ of Sec. 21-108-72, containing 320 acres.
Said Grantor, R. J. Huston, states and covenants that he has never occupied the said real estate or any part thereof as a homestead, and neither he, nor any member of his family has any homestead rights in said real estate or any part thereof, the full name of said grantor, R. J. Huston, is Robert J. Huston, and this deed is given to supplement and perfect a warranty deed of said real estate executed by said R. J. Huston under the name of Robert J. Huston, and Louisa B. Huston, his wife, as grantors to said Grantee, Charles S. McDonald, as Grantee, which deed was dated November 3, 1910, and was
150 recorded on the 17th day of April, 1911, in Book 10 of deeds at page 82 thereof, in the office of the said Register of Deeds of said County of Buffalo.—(No. 3, of Abstract.)

No. (6).

In Circuit Court, Fourth Judicial Circuit, Buffalo County, S. D.

Charles S. McDonald, Plaintiff, Grantors,

vs.

The Unknown Heirs at Law, Devisees, Legatees, and the Executor or Administrator of Hin-tun-ka-sau or Weasel, Deceased, et al., Defendants.

Character of Inst., Notice of Lis Pendens.
Date of Inst., July 31, 1912.
Consideration, $—.
Date of filings, August 1, 1912.

Hour of filing, 10 a. m.
Record: Book 2, page 365.
Date of acknowledgement, —— —, —.
Signed by Bailey & Voorhees, Attorneys for Plaintiff.
Before whom acknowledged, — — ——.
Residence of Officer, Sioux Falls, S. Dak.
Witnesses, seal; Yes.

Description and Remarks.

Describes the S. ½ of Sec. 21-108-72, 320 acres.
States that action has been commenced by the plaintiff against the Defendants herein for the purpose of determining all adverse claims to the real property described in the complaint herein, and of quieting the title to said real property in the plaintiff. That said
151 complaint was filed in the office of the Clerk of Courts on the 31st day of July, 1912.

No. (7).

In Circuit Court, Fourth Judicial Circuit, Buffalo County, S. D.

Frank B. Smith, Judge.

Attest: C. B. Beelman, Clerk.

CHARLES S. MCDONALD, Plaintiff,

vs.

THE UNKNOWN HEIRS AT LAW, DEVISEES, LEGATEES, and the Executor or Administrator of Hin-tun-ka-sau or Weasel, Deceased, et al., Defendants.

Character of Inst., Judgment.
Date of Inst., Nov. 20, 1912.
Consideration, $—.
Date of filing, Nov. 21, 1912.
Hour of filing, 5 p. m.
Book 2, M. R., page 378.
Date of acknowledgement, —— —, —.
Before whom acknowledged, —— ——.
Residence of Officer, —— ——.
Witnesses, seal; Yes.

Description and Remarks.

Describes the S. ½ of Sec. 21-108-72, 320 acres.
States among other things that the Plaintiff herein, Charles S. McDonald, is the owner in fee simple absolute of and is entitled to the possession of the said real property and each and every part thereof.

Certified to by C. B. Beelman, Clerk of the Circuit Court, as a true and correct transcript of the original Judgment now on file in his office, Nov. 21, 1912.

152 See Exhibit D, hereto attached.

Exhibit "C" attached to and made a part of Abstract No. 758 to the S. ½ of Sec. 21-108-72. Refers to No. 2 hereof.

Indian Deed Inherited Lands.

This Indenture, made and entered into this 9th day of October, one thousand nine hundred and eight, by and between Plays With Iron, Wounded Knee—Mrs. Red Water No. 2 of Buffalo County, So. Dak. Sole and only heirs of Weasel, deceased, a Crow Creek Sioux Indian, party of the first part, and R. J. Huston of Minnehaha Co., S. D., party of the second part: Witnesseth, that said parties of the first part, for and in consideration of the sum of $1751.00 Seventeen Hundred Fifty One dollars, in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, and convey unto said party of the second part the following described real estate and premises situated in Buffalo County, State of South Dakota, to wit: South Half of Section Twenty-one (21), Township one hundred eight (108) North, of Range Seventy-two (72), West 5th P. M., containing 320 acres, together with all the improvements thereon and the appurtenances thereunto belonging, and warrant the title to the same.

To have and to hold said described premises unto the said
153 party of the second part, his heirs, executors, administrators, and assigns, forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

PLAYS WITH IRON (his x mark). [SEAL.]
WOUNDED KNEE (his x mark). [SEAL.]
MRS. RED WATER No. 2 (her x mark). [SEAL.]

Witnesses:
A. B. CUBBUCK.
MARK WELLS.

STATE OF SO. DAKOTA,
County of Buffalo, ss:

Be it remembered, That on this 9th day of October, A. D. 1908, before the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Plays With Iron, Wounded Knee, Mrs. Red Water No. 2, to me personally known to be the identical persons who executed the within instrument of writing, and such persons duly acknowledged the execution of the same.

In testimony whereof, I have hereunto subscribed *by* name and affixed my Notarial Seal on the day and year last above written.

[Seal of Notary Public.]

DON V. MOORE,
Notary Public.

My commission expires 1-10-1911.

154 Department of the Interior, Office of Indian Affairs, February 27, 1909—The within deed is respectfully submitted to the Secretary of the Interior, with the recommendation that it be approved. F. M. Conser, Chief Clerk. Department of the Interior, March 2, 1909. The within deed is hereby approved. Jms. Ellerson, Assistant Secretary. Office of Indian Affairs, Land Division, March 26, 1909. Recorded in Deed Book, Inherited Indian Lands, Vol. 18, page 337. State of South Dakota, County of Buffalo, ss. Filed for record April 20, A. D., 1909, at 5 o'clock p. m. and recorded in Book 9 of Deeds Records on page 110. W. D. Keen, Register of Deeds, by Fred J. Grace, Deputy. Fee $1.25.

Certificate of Continuation.

Dye & Hill, Bonded Abstracters.

The South Half *Quarter* of Sec. 21, Twp. 108, Range 72. We hereby certify that we have carefully re-examined the title to the within described land and that entry No. 5 inclusive to which this is attached contains a full and correct abstract of all conveyances upon record in the office of Register of Deeds of Buffalo County, South Dakota, affecting the same, filed since March 7th, 1912, at 10 A. M., as shown by his records and indices. We further certify that there are no Judgments, Suits Pending or Mechanics' Liens unsatisfied against R. J. Huston, Robert J. Huston and Charles S. McDonald, on file or of record in the office of the Clerk of the Circuit and County Courts of said Buffalo County, as shown by his records and indices, which appear to be liens on said land, except * * *

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We further certify that, according to the records and indices in the County Treasurer's office, there are no real or personal taxes due and unpaid upon said land, and that there are no Tax Sales of said land unredeemed, and that no Tax Deeds have been issued thereon. All taxes paid.

Witness our hand and seal at Gann Valley, S. D., June 18th, 1912, at 10 a. m.

DYE & HILL.
Bonded Abstracters,
Buffalo County, South Dakota.

[Impression of Seal of Dye & Hill, Abstracters.]

Exhibit D to abstract. (This exhibit is the same as Defendant's Exhibit 6. It is the ordinary judgment in an action to quiet the title against unknown claimants and as it is long and was not received in evidence is not herein copied. It is sufficiently indicated at entry 7 of the abstract.)

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Certificate of Continuation.

Dye & Hill, Bonded Abstracters.

The South half of Sec. 21, Twp. 108, Range 72. We hereby certify that we have carefully re-examined the title to the within described land and that entries No. 6 to No. 7 inclusive to which this is attached, contain a full and correct abstract of all conveyances upon record in the office of Register of Deeds of Buffalo County, South Dakota, affecting the same, filed since June 18th, 1912, at 10 A. M. as shown by his records and indices.

We further certify that there are no judgments, Suits Pending or Mechanics' Liens unsatisfied against Charles S. McDonald on file or of record in the office of the Clerk of the Circuit and County Courts of said Buffalo County, as shown by his records and indices, which appear to be liens on said land.

We further certify that, according to the records and indices in the County Treasurer's office, there are no real or personal taxes due and unpaid upon said land, and that there are no Tax Sales of said land unredeemed, and that no Tax Deeds have been issued thereon.

157 Witness our hands and seal at Gann Valley, S. D., November 26th, 1912, at 2 P. M.

DYE & HILL.
Bonded Abstracters,
Buffalo County, South Dakota.

[Impression of Seal of Dye & Hill, Abstracters.]

Said Exhibit 7, G. M. H., being the deed offered in evidence by the defendant, as above stated, and as shown at page 64 of the record, was a straight warranty deed of the land in question executed by the defendant to the plaintiff and appears in full at page 97 of the record and is as follows:

Know all men by these presents: That Charles S. McDonald, of Sioux Falls, of Minnehaha County and State of South Dakota, party of the first part, for and in consideration of the sum of Four Thousand ($4,000) Dollars, to him in hand paid by George W. Egan, of said Sioux Falls, whose post office address is Sioux Falls, South Dakota, party of the second part, the receipt whereof is hereby acknowledged, does hereby Grant, Bargain, Sell and Convey unto the said party of the second part, his heirs and assigns forever, the following described Real Estate, lying and being in the County of Buffalo and State of South Dakota, to-wit: The south half of section twenty-one (21) in Township one hundred and eight (108) north; of
158 range seventy-two (72) west of the Fifth Principal Meridian, containing three hundred and twenty (320) acres, more or less, according to the United States Government Survey thereof.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said party of the second part, his heirs and assigns forever. And the said party of the first part hereby states and covenants that

neither he nor any member of his family has ever resided upon said premises or any part thereof; that no part of said premises is or ever has been his homestead and that neither he nor any member of his family has any homestead rights therein.

And the said Charles S. McDonald, the said party of the first part, for himself and for his heirs, executors and administrators, does covenant with the said party of the second part, his heirs and assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances and the above bargained and granted lands and premises, in the quiet and peac-able possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will forever warrant and defend.

159 In testimony whereof, the said party of the first part has hereunto set his hand and seal this 12th day of December, 1912.

CHARLES S. McDONALD. [SEAL.]

STATE OF SOUTH DAKOTA,
Minnehaha County, ss:

On this 12th day of December, A. D. 1912, before the undersigned a Notary Public in and for said County and State, personally appeared Charles S. McDonald, known to me to be the person who is described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

Witness my hand and notarial seal the day and year last above written.

[Impression of Notarial Seal.]

J. H. VOORHEES,
Notary Public,
Minnehaha County, South Dakota.

That portion of folio 186 of the brief for plaintiff following the words "defendant rests" and showing the motion of the plaintiff for a verdict, is, the defendant suggests, improperly included in the statement made by the plaintiff in his brief because it was on the first trial of the case which was had to a jury. If, however, it is to be considered by this court, the statement should show in

160 connection with it and immediately preceding it the motion of the defendant for a directed verdict, which appears at the foot of page 67 of the record and was as follows:

Defendant now moves the Court to direct the jury to return a verdict in favor of the defendant on all the issues in this action for the reasons stated in the motion made at the conclusion of the plaintiff's main case; and the further reason and upon the ground that the uncontradicted testimony shows that the title to this property is now perfected and is in the defendant and is merchantable, and is a title of the character called for by the contract. The testimony further shows that the defendant has tendered to the plaintiff an abstract

showing such merchantable title and a proper deed conveying the property to the plaintiff, as called for by the contract. Motion is overruled. Exception allowed.

The statements in folios, 187, 188 and 189 and in the first four lines of folio 190 of the brief for plaintiff are perhaps improperly included as they have to do with the first trial of the case and the granting of the motion of the defendant for a new trial.

161 *Argument.*

The Questions for Decision.

The plaintiff states at folio 257 of his brief that the only questions before this court on this appeal are:

"1. Did respondent (defendant) have, and did his abstract show in him, a merchantable title on or about March 1st, 1912; and

2. Was respondent in a position to and did he convey by warranty deed properly tendered to appellant, the South half of section twenty-one (21) in township one hundred eight (108) North, range seventy-two (72) West, in Buffalo County, South Dakota, by a good and merchantable title, which premises it is admitted, appellant purchased from respondent on April 15th, 1911?"

The defendant does not concede that the questions before the court on this appeal are in all respects correctly stated by the plaintiff. We will, however, assume at this stage of the argument that the first question above is correctly stated and will consider that question first.

162 I.

The Character of the Title.

I. The Evidence of the Title.

The contract made April 15th, 1911, between the plaintiff and the defendant for the sale by the defendant to the plaintiff of the land in question, which contract is Exhibit E and is set forth in folio 71 of the brief for the plaintiff, provides for the payment of the balance of the purchase price on or before March 1st, 1912, and that an abstract showing a good and merchantable title is to be furnished. As appears from the statement made in the brief of the plaintiff and from the additional statement made in the earlier part of this brief for the defendant, an abstract of title to the property was submitted to the plaintiff on March 1st, 1912, which abstract was returned to the defendant on or about March 4th, 1911, accompanied by an opinion or letter pointing out certain alleged defects in the title. That abstract and the accompanying opinion or letter are not shown in the statement made in the brief for the plaintiff or in the additional statement made in this brief for the defendant. They are, however, immaterial as they were superseded by the second abstract, part of Exhibit 2, which was submitted by the defendant to the plaintiff on

or about March 7th, 1912, and a letter of opinion, Exhibit B,
163 by E. E. Pierson on such second abstract, which second abstract, accompanied by such letter of opinion, were returned or sent by the plaintiff to the defendant on or about March 12th, 1912, together with a letter of the plaintiff to the defendant of that date, Exhibit D. The said second abstract which was so submitted to the plaintiff appears at folios 113 to 144, inclusive, of the brief of the plaintiff. Part of the said letter of opinion on that abstract, Exhibit B, appears at folio 38 of the brief for plaintiff and said letter of opinion, Exhibit B, is set forth in full in the additional statement in the preceding part of this brief for the defendant. Said letter of the plaintiff, Exhibit D, sent to the defendant with said abstract and letter of opinion, appears at folio 45 of the brief of plaintiff.

As will appear from a reference to the copy of said abstract, Exhibit 2, at folio 113 of the brief for the plaintiff, the said abstract showed in substance the following.

Entry 1. A trust patent by the United States to Hin-Tun-Ka-Sau or Weazel, a copy of which patent is attached to the abstract as Exhibit B and appears at folio 134 of the brief for plaintiff.

Entry 2. An Indian deed of inherited lands by Plays with Iron, Wounded Knee and Mrs. Red Water No. 2, sole and only heirs of Weazel, deceased, as grantors, to R. J. Huston, as grantee, which deed was recommended for approval by the chief clerk of the
164 Commissioner of Indian affairs, February 27th, 1909, and was approved by the Assistant Secretary of the Interior.

Entry 3. A warranty deed by Robert J. Huston and wife as grantors to Charles S. McDonald as grantee.

Entry 4. A certified copy, duly recorded in the office of the register of deeds of Buffalo County, of the final decree of distribution made by the County Court of Buffalo County, in the matter of the estate of Hin-Tun-Ka-Sau or Weazel, deceased, in that court, which copy was attached to the abstract as Exhibit A in connection with said entry 4 and which copy is also defendant's Exhibit 3 and appears at folio 124 of the brief of plaintiff.

Said four entries were followed by a proper abstractor's certificate made by Dye & Hill, bonded abstractors of Buffalo County, under date of March 7th, 1912, at ten o'clock A. M.

The defendant contends that that abstract so submitted to the plaintiff on or about March 7th, 1912, showed a good and merchantable title to the property covered by it in defendant. Even if it could be said that the abstract was in some respects incomplete and technically defective, which, in our opinion, could not properly be said, the plaintiff, cannot *made* in this court, and, for that matter, could not have made on the trial of this action in the court
165 below, any objections to the abstract other than those set forth in his said letter of opinion thereon, Exhibit B. In fact, as will appear from that letter of opinion, the plaintiff did not make in substance any objection to the abstract except the objection of the alleged want of capacity of the heirs of the deceased patentee to convey the land to Huston (who afterwards conveyed the land to

the defendant) and, for that matter, the abstract being fair and sufficiently full on its face, that was the only objection which the plaintiff could raise.

We will later analyze and consider the opinion, Exhibit B, prepared by Mr. Pierson on this question and will distinguish the cases cited by him in it. This question, which in fact is the only question involved in this case, is an important question, not only so far as the case at bar is concerned, but also, if we are correctly advised, because quite a number of titles to lands in South Dakota are in exactly the same condition as was the title to this land at the time the said second abstract, Exhibit E, was submitted to the plaintiff. The contention of the defendant that his title was even at that time, good and merchantable can perhaps be best presented by our showing in the first instance the legislation by Congress with respect to allotments of land to Indians.

166 II. *Congressional Legislation.*

The legislation of Congress so far as it pertains to this question is in substance as follows:

The General Indian Appropriation Bill, passed at the first session of the 48th Congress, Chapter 180 of the Acts of that Congress, approved July 4th, 1884, 23 St. L. 76, on page 96, provides:

"That such Indians as may now be located on public lands, or as "may, under the direction of the Secretary of the Interior, or other- "wise, hereafter, so locate, may avail themselves of the provisions "of the homestead laws as fully and to the same extent as may now "be done by the citizens of the United States. * * * All patents "therefor shall be of the legal effect, and declare that the United "States does and will hold the land thus entered for the period of "twenty-five years, in trust for the sole use and benefit of the Indian "by whom such entry shall have been made, or, in case of his de- "cease, of his widow and heirs according to the laws of the state or "territory where such land is located, and that at the expiration of "said period the United States will convey the same by patent to the "said Indian, or his widow and heirs as aforesaid, in fee, discharged "of said trust and free of all charge or encumbrance whatsoever."

The foregoing has not been repealed except in so far as
167 it was in part repealed by subsequent legislation.

In 1887, at the second session of the 49th Congress, there was passed what is known as The Indian General Allotment Act, Chapter 119 of the Acts of that congress. It was approved February 8, 1887, and is found in 24 St. L. 388. This Act provided generally for the allotment of lands to Indians.

Part of Section 1 of the said General Allotment Act is copied at page 261 of the brief for plaintiff and such parts of Sections 5 and 6 of the Act as are pertinent to the question under consideration are copied at Folio 263 of the brief for plaintiff. It will be noted that in the first Section of the Act provision for general allotments to Indians was made; that in the fifth Section of the Act it is provided that the patents to be issued in the name of the allottees shall be of

the same character as the patents provided for in the Act of Congress of July 4, 1884, 23 St. L. 96, ante, and that in Section 6 of the Act it is not only provided that each member of the bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside and shall not be denied the equal protection of the law, but it is also provided that every
168 Indian to whom allotments shall have been made under that Act or under any law or treaty, shall be a citizen of the United States and entitled to all the rights, privileges and immunities of such citizens.

At the second session of the fiftieth Congress Chapter 405 of the acts of that Congress was enacted and approved March 2, 1889. The Chapter is entitled: "An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes." This Act is found in 25 St. L., 888. It is the Act of Congress of the 2nd of March, 1889, referred to in the patent to the land in question, issued to Hin-tun-ka-sau, or Weazel, shown at Folio 134 of the brief for plaintiff.

Section 6 of that act provides for the creation of what was in effect the Crow Creek reservation. Included in the lands described in that section is the whole of township 108, range 72. Other sections of the act provide in a similar manner for the creation of the Pine Ridge, the Standing Rock, the Cheyenne River, and the Lower Brule reservations.

Section 8 of the Act is in part as follows:

"Sec. 8. That the president is hereby authorized and required "whenever in his opinion any reservation of such Indians, or any "part thereof, is advantageous for agricultural or grazing
169 "purposes, and the progress in civilization of the Indians re- "ceiving rations on either or any of said reservations shall "be such as to encourage the belief that an allotment in severalty to "such Indians, or any of them, would be for the best interest of said "Indians, to cause said reservation, or so much thereof as is neces- "sary, to be surveyed, or resurveyed, and to allot the lands in said "reservation in severalty to the Indians located thereon as aforesaid, "in quantities as follows: To each head of a family, three hundred "and twenty acres."

Section 11 of that Act, which is mentioned in the said patent to Hin-tun-ka-sau, or Weazel, and under the provisions of which the said patent was issued, is as follows:

"Sec. 11. That upon the approval of the allotments provided for "in this act by the Secretary of the Interior, he shall cause patents to "issue therefor in the name of the allottees, which patents shall be "of the legal effect, and declare that the United States does and will "hold the lands thus allotted for the period of twenty-five years, in "trust for the sole use and benefit of the Indian to whom such allot- "ment shall have been made, or, in case of his decease, of his heirs "according to the laws of the State or Territory where such land is "located, and that at the expiration of said period the United States

"will convey the same by patent to said Indian, or his heirs,
170 "as aforesaid, in fee, discharged of said trust and free of all "charge or incumbrance whatsoever, and patents shall "issue accordingly. And each and every allottee under this "act shall be entitled to all the rights and privileges and be "subject to all the provisions of section six of the act ap- "proved February eighth, eighteen hundred and eighty-seven, "entitled An act to provide for the allotment of lands in "severalty to Indians on the various reservations, and to extend "the protection of the laws of the United States and the Territories "over the Indians and for other purposes.' Provided, That the "President of the United States may in any case, in his discretion, "extend the period by a term of not exceeding ten years; and if "any lease or conveyance shall be made of the lands set apart and "allotted as herein provided, or any contract made touching the "same, before the expiration of the time above mentioned, such lease "or conveyance or contract shall be absolutely null and void; Pro- "vided further, That the law of descent and partition in force in the "State or Territory where the lands may be situated shall apply "thereto after patents therefor have been executed and delivered. "Each of the patents aforesaid shall be recorded in the General Land "Office, and afterwards delivered, free of charge, to the allottee en- "titled thereto."

171 It will be observed, therefor-, that the patent in question, issued to Hin-tun-ka-sau, or Weazel, under the provisions of said Section 11 of the Act of Congress of March 2, 1889, was substantially of the same character as the patents provided for in the fifth Section of the Indian General Allotment Act of the patents provided for in the preceding Act of Congress of July 4, 1884, and it will be also observed that by the provisions of said Section 11 of the Act of March 2, 1889, the allottee and patentee, Hin-tun-ka-sau, or Weazel, became entitled to all of the rights, privileges and immunities conferred by Section 6 of the Indian General Allotment Act, that is to say, among other things, he became a citizen of the United States and entitled to all the rights, privileges and immunities of such citizens.

The legislation by Congress with reference to allotments of land to Indians, which we have above described, is the only legislation of that character mentioned in the brief for plaintiff, except such acts of Congress as are referred to in quotations contained in the brief from a few decisions of the Federal and State Courts, which acts, as will hereafter be shown in commenting upon such decisions, in no way affects the case at bar. There was, however, subsequent to the enactment of Chapter 405 of the Acts of the 50th Congress, 25 St. L. 888, under the provisions of the 11th Section of which Act,
172 as has been shown above, the patent involved in the case at bar was issued, legislation by Congress which was of importance, so far as the questions involved in this case are concerned, and which in effect altered some of the terms and conditions of the said patent.

Chapter 888 of the Acts of the 57th Congress, 32 St. L. 245, approved May 27, 1902, was the General Indian Appropriation Bill

passed at the first session of that Congress. Section 7 of that Acts, found at 32 St. L. 275, is as follows:

"Sec. 7. That the adult heirs of any deceased Indian to whom a "trust or other patent containing restrictions upon alienation has "been or shall be issued for lands allotted to him may sell and con- "vey the lands inherited from such decedent, but in case of minor "heirs their interests shall be sold only by a guardian duly appointed "by the proper court upon the order of such court, made upon peti- "tion filed by the guardian, but all such conveyances shall be subject "to the approval of the Secretary of the Interior, and when so ap- "proved shall convey full title to the purchaser, the same as if a final "patent without restriction upon the alienation had been issued to "the allottee. All allotted land so alienated by the heirs of an In- "dian allottee and all land so patented to a white allottee shall there-
"upon be subject to taxation under the laws of the state or
173 "territory where the same is situated: Provided, That the
"sale herein provided for shall not apply to the homestead "during the life of the father, mother or the minority of any child "or children."

Said Section 7 has not been repealed.

Chapter 2348, enacted at the first session of the 59th Congress and approved May 8, 1906, 34 St. L. 182, amended Section 6 of the Indian General Allotment Act, 24 St. L. 388, hereinabove described. The amendment provided, among other things, that thereafter (that is to say after May 8, 1906) when an allotment of land is made to any Indian, and such Indian dies before the expiration of the trust period, the allotment shall be cancelled, and the land shall revert to the United States and the Secretary of the Interior shall ascertain the legal heirs of such Indian and shall cause to be issued to said heirs and in their names a patent in fee simple for said land, or the Secretary may cause the land to be sold as provided by law and issue a patent therefor to the purchaser and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian, and that the action of the Secretary of the Interior in determining the legal heirs of any deceased Indian as provided in said amending act,
shall in all respects be conclusive and final. This amend-
174 ment, however, did not and does not affect the case at bar, as the allotment to Hin-tun-ka-sau, or Weazel, was made prior to 1906, and in fact the trust patent to him was issued in 1895. We refer to the amendment, however, to show that some years ago Congress saw fit to abandon, to some extent at least, the policy which it had followed for a loong period of treating the Indians in all respects as wards of the Government and withholding from them the power to dispose of their property as they saw fit, which policy, if we correctly read the brief for plaintiff, plaintiff contends is still the policy of the Federal Government.

Chapter 431, enacted at the second session of the 61st Congress and approved June 25, 1910, 36 St. L. 855, is entitled:

"An Act to Provide for Determining the Heirs of Deceased In- "dians, for the Disposition and Sale of Allotments of Deceased In- "dians, for the Leasing of Allotments, and for Other Purposes."

The Act (in Section 1 thereof) among other things provides "That when any Indian to whom an allotment of land has been "made, or may hereafter be made, dies before the expiration of the "trust period and before the issuance of a fee simple patent, with- "out having made a will disposing of said allotment as hereinafter "provided, the Secretary of the Interior, upon notice and hearing,

"under such rules as he may prescribe, shall ascertain the
175 "legal heirs of such decedent, and his decision thereon shall
"be final and conclusive."

This Act of Congress, 36 St. L. 855, if we are correctly advised, is sometimes referred to as the Burke Act. The Act, however, in no way affects the case at bar, as it is not retroactive and applies only, so far as sales of allotted lands are concerned, to sales made after the approval of the Act, June 25, 1910. Not only was the patent to the land involved in the case at bar issued long prior to that time, but the sale by the heirs of the patentee was made in 1909, and therefore prior to the passage and approval of the so-called Burke Act.

III. *The Sale by the Heirs Passed a Good Title.*

It clearly appears, therefore, that the land in question was allotted and a trust patent to the same issued to the allottee, Hin-tun-ka-sau or Weazel, under the provisions of Section 11 of Chapter 405 of the Acts of the 50th Congress, approved March 2, 1889, 25 St. L. 891, which Section, as has been shown, is, so far as the questions in this case are concerned, substantially identical with the provisions of the Indian General Allotment Act, approved February 8, 1887, 24 St. L. 388, and that after the death of the allottee named in the said

trust patent the land was sold by his heirs, pursuant to the
176 provisions of Section 7 (32 St. L. 275), of Chapter 888 of the Acts passed at the first session of the 57th Congress, and approved May 27, 1902. Said Section 7, which is hereinbefore copied, is, so far as the question involved is concerned, as follows:

"The adult heirs of any deceased Indian to whom a trust * * * "patent containing restrictions upon alienation has been * * * "issued for land allotted to him may sell and convey the lands in- "herited from such decedent * * * but such conveyance shall "be subject to the approval of the Secretary of the Interior, and "when so approved shall convey a full title to the purchaser, the "same as if a final patent without restriction upon the alienation "has been issued to the allottee."

It will be remembered that the record shows that the land was conveyed to the defendant, McDonald by one Huston; that Huston obtained his title by a so-called Indian deed of inherited land, executed in October, 1908, and approved by the Secretary of the Interior in March, 1909; that the grantors in said deed to Huston were described therein as the sole and only heirs of Weazel, deceased; and that in proceedings had in the administration in the estate of Weazel in the County Court of Buffalo County, South Dakota, in which County the land was situated, that Court in its final decree of

distribution had found and decided that the said grantors
177 were the sole and only heirs of the deceased. The contention of the plaintiff, as we understand it, is, in effect, that the title to the land is not good and merchantable, because there was not a sufficient showing that the grantors in the said deed to Huston were the sole heirs of the deceased, patentee, Hin-tun-Ka-sau or Weazel. Whether or not there was such a showing depends upon the effect to be given to the said final decree of distribution made by the County Court of Buffalo County, in the matter of the estate of Hin-tun-ka-sau or Weazel, deceased, hereinbefore described, (Exhibit 3, copied at folio 124 of the brief of plaintiff).

In the case of the United States vs. Park Land Co., 188 Fed., 383, decided in 1911, the court had occasion to consider, in connection with the Indian General Allotment Act, the effect of the so-called "Nelson Law, 25 St. L. 642, which was approved January 14, 1889, and which provided for allotments of land to Chippewa Indians of the same character and effect as the allotments under the Indian General Allotment Act. In that case the court held as follows (quoting from the Syllabus):

"Under act Feb. 8, 1887, c. 119, 24 Stat. 388, provided for the "allotment of Indian reservation lands to full or mixed blood In-"dians, under trust patents, as amended by Act Jan. 14, 1889, c. 24,
"25 Stat. 642, provided that the law of descent and partition
178 "in force in the state or territory where the lands are situated "shall apply thereto, where the allottee of land in Minnesota "dies after his trust patent has issued, his allotment descends to his "heirs, as provided by the laws of that state, to be ascertained by the "probate court of the county in which the lands are located."

We quote as follows from the opinion in this case:

"In 1889 Senator Nelson framed and had passed what has ever "since been known as the "Nelson Law" (Act Jan. 14, 1889, c. 24, "25 Stat. 642). That act provides for the removal of the Chippewa "Indians here in Minnesota—the Indians up here in the northern "part of our state—to the White Earth Indian Reservation, and for "allotments to them on that reservation; or, if any of them preferred "to stay on the reservations on which they then were, for allotments "to them on those reservations. It provided that those allotments "should be made in conformity with the general allotment act of "1887, and that the allotments should have the same effect, that is, "be held in the same way, as I understand it. The allotments, "therefore, made to Indians on the White Earth Indian Reserva-"tion here in Minnesota stood exactly as allotments made to Indians "on any other reservation under the general allotment act. Now,
"in that general allotment act, after prescribing the method
179 "of making the allotments, and how the title should be held,
"that is, under the trust patents, with the restriction upon "alienation provided for in that act, Congress provided:

"That the law of descent and partition in force in the state or "territory where such lands are situate shall apply thereto (that is, "to these allotments) after patents therefor have been executed and "delivered, except as herein otherwise provided."

* * * * * * *

"As I understand the law, and I think that is the fair construc-
"tion of it, if any allottee dies after his trust patent has issued,
"whether full blood or mixed blood, his allotment descends to his
"heirs, as provided by the laws of the state of Minnesota. And the
"only way that I know of that we can ascertain who his heirs are
"and what portion of the allotment those heirs are respectively en-
"titled to would be by proceedings in the probate court. So that, it
"seems to me to be competent for the probate court of Becker county,
"where this reservation is, in case of the death of any allottee,
"whether full blood or mixed blood, to ascertain and declare who
"his heirs are and in what proportions they inherit his allotment.
"I think it is an inheritable estate, governed by the law of descent
"and partition in the state of Minnesota. And I do not see
180 "why, if necessary, the proper proceedings might not be had
"to partition that allotment amongst the heirs of the deceased
"allottee." * * *

* * * * * * *

"Such allotment could not be conveyed even with the consent of
"the Secretary of the Interior. Now, in the act of May 27, 1902,
"c. 888, 32 Stat. 275, Congress removes to some extent the restric-
"tions which it had theretofore imposed upon the sale and convey-
"ance of these allotments, by providing in section 7 that:

"The adult heirs of any deceased Indian to whom a trust or other
"patent containing restrictions upon alienation has been or shall be
"issued for lands allotted to him may sell and convey the lands in-
"herited from such decedent, but in case of minor heirs their in-
"terests shall be sold only by a guardian duly appointed by the
"proper court upon the order of such court, made upon petition
"filed by the guardian, but all such conveyances shall be subject to
"the approval of the Secretary of the Interior, and when so approved
"shall convey a full title to the purchaser, the same as if a final pat-
"ent without restriction upon the alienation had been issued to the
"allottee."

"Adult heirs could themselves sell and convey the land inherited
"from such decedent: but in the case of minor heirs their
181 "interest could be sold and conveyed only by a guardian duly
"appointed by the proper court, upon the order of such
"court. Adult heirs could sell and convey. Minor heirs could sell
"and convey by guardian, after the appointment of a guardian, and
"an order of court allowing it made upon petition filed by the
"guardian. But all conveyances, whether of an adult's interest or
"of a minor's interest, should be subject to the approval of the Sec-
"retary of the Interior."

Under the authority of that case, the United States vs. Park Land Co., the County Court of Buffalo County, South Dakota, had jurisdiction to determine for the purposes of distribution of the estate of the deceased allottee, Hin-tun-ka-sau, or Weazel, his heirs.

In the case of the United States Fidelity and Guaranty Company vs. Hansen, 36 Okla. 459, 129 Pac. 60, the Supreme Court of Oklahoma had occasion to consider the effect of the provisions of Section

7 of Chapter 888 (the Indian Appropriation Bill of May 27, 1902) of the 57th Congress, 32 St. L. 275, hereinbefore described, in a case in which a conveyance had been made of the interest in an allotment of minor heirs of a deceased Indian allottee. The conveyance had been made by a guardian of such minor heirs, appointed by a probate court of Oklahoma.

182 The court held as follows (quoting from the Syllabus):

"Under the terms of section 7 of the Indian Appropriation " Bill of May 27, 1902, c. 888, 32 Stat. 275, which provides that " the interests of minor heirs 'shall be sold by a guardian duly ap- " pointed by the proper court,' the probate courts of Oklahoma " territory were the proper courts to appoint guardians of minor " heirs of a deceased Indian to whom a patent containing restrictions " upon alienation had been issued for lands allotted to him, and " had jurisdiction to order a sale of such lands."

In discussing said Section 7, 32 St. L. 275, the court said (quoting from the opinion):

"This is a later act of Congress than the organic act. It will not " be disputed that, even though the organic act prohibited the pro- " bate courts from exercising jurisdiction over members of Indian " tribes, Congress could have conferred the jurisdiction upon those " courts by a later enactment. The question then is whether sec- " tion 7 of the Appropriation Bill, quoted above, conferred juris- " diction upon the probate courts, or recognized their jurisdiction. " The general allotment act was not limited to the Indians in " Oklahoma territory. It extended to all Indians in the United

" States. Section 7 of the Appropriation Bill, being designed

183 " to remove some of the restrictions created by the general

" allotment act, extended in the same way. It was not limited " in its effect to one state or to Oklahoma territory. When it pro- " vided that lands of minor heirs should be sold only by guardian " duly appointed by the 'proper court' upon the order of such court, " it undoubtedly meant the court having jurisdiction under the laws " of the state or territory where the land was situated to appoint " guardians and administer the estates of minors. This court in " Oklahoma territory was the probate court. *It* is clear that any " other holding would lead to great inconveniences. No other court " had the machinery necessary to carry on such business. It is " highly probable that in making the requirement that the sale " should be through a guardian it was intended to give to titles thus " conveyed the appearance of regularity and stability. If the dis- " trict courts had taken jurisdiction of that class of guardianships " when there was no law of the territory conferring the jurisdiction " upon them, and when they did not attempt to exercise it in other " cases, it would have resulted in uncertainty and confusion which " could not have been otherwise than detrimental to the interests of " the ward. The organic act of the territory of Oklahoma provided

" for probate courts, and, while it did not define their juris-

184 " diction, the name indicated that Congress expected that

" probate jurisdiction would be conferred upon them, and " the appointment of guardians for minors is embraced within

"the term 'probate jurisdiction.' The Department of the In-
"terior recognized the jurisdiction of the probate court in such
"cases. The construction of the statute by the officers of the federal
"government is entitled to consideration; but it is believed there is
"not much room for construction. The plain language of the statute
"recognized the jurisdiction of the probate court. It was the only
"proper court to appoint guardians."

If under the provisions of said Section 7, 32 St. L. 275, which, as we have shown in an earlier part of this brief, is the congressional statute under which the sale to Huston, the grantor of the defendant, McDonald, of the land involved in the case at bar was made by the heirs of the deceased allottee, the probate court, as held by the Supreme Court of Oklahoma in the case last cited, was the proper court to appoint a guardian for the minor heirs of a deceased Indian allotte-, certainly it was also the court to administer the estate of such deceased allottee and it necessarily follows that it was the court which Congress had in mind in enacting said Section 7, for otherwise Congress would have specified some other court.

185 It will be remembered that under the Acts of Congress hereinbefore described regarding allotments, the allottee Weazel was made a citizen of the United States. He therefore became a citizen of the State of South Dakota as well. This clearly appears from the cases of the State vs. Denover, 6 N. D. 586, 72 N. W. 1014, Farrell vs. United States, 110 Fed. 942-947, and the United States vs. Kiya, 126 Fed. 879. His estate, therefore, was clearly subject to administration in the County Court of the County of Buffalo.

Section 4 of the Probate Code of the State of South Dakota confers upon the County Courts original jurisdiction in the administration and settlement of the estates of deceased persons. Section 25 of that Code provides that in the exercise of probate jurisdiction by County Courts they shall have, among other powers, the power to order and regulate all distributions of property or estates of deceased persons. Section 308 of that Code provides that the County Court in its order or decree of distribution of the estate must name the persons and the proportions or parts to which each shall be entitled, and further provides that such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal.

186 The power and duty imposed upon the County Court by the Probate Code to name the persons and proportions or parts of the estate each shall receive clearly confers upon the Court the power to ascertain and determine who are the proper persons to be named for that purpose.

Section 26 of the Probate Code provides that the proceedings of the County Court shall be construed in the same manner, and with like intendments, as the proceedings of Courts of general jurisdiction, and that to the records, orders, judgments and decrees of the County Courts there shall be accorded like force, effect and legal presumptions as to the records, orders, judgments and decrees of the Circuit Courts.

It is difficult to understand, therefore, the contention of the plaintiff in the case at bar that the County Court of the County of Buffalo did not have any jurisdiction to determine the heirs of the deceased allottee, Weasel. The final decree of distribution, entered by that Court in his estate, is certainly regular on its face and is a sufficient distribution for the purposes of the title to the land in question of the heirship.

In addition to the foregoing cases with reference to the validity of the title involved in the case at bar and the jurisdiction with respect thereto of the state courts we cite the following cases:

187 Lomax vs. Pickering, 173 U. S. 26. This case arose in Illinois. A patent to the land involved had been issued to an Indian, which patent contained the provision that the land should never be leased or conveyed by the grantee or his heirs without permission of the President of the United States. After the death of the Indian to whom the land was so patented, the land was, by a decree in partition, by the State Court set off to one of the children of the patentee. Thereafter such child executed a deed of the land to one Horton without having the approval of the President endorsed on the deed. Some years thereafter, however, the deed was submitted to and approved by the President. The court held that the approval of the deed by the President was retroactive, and operated as if it had been endorsed on the deed when originally given, and that there was nothing in the fact that the partition proceedings under which Robinson obtained the title to the land were not approved by the President. The effect of the decision was that a good title to the land was obtained by Horton and his grantee.

Lykins vs. McGrath, 184 U. S. 169. In this case the court affirmed its holding in the case of Lomax vs. Pickering, supra, as to the effect of a subsequent approval (in that case by the Secretary of the Interior) of a deed by an Indian, when the Indian was au-

188 thorized to sell the land and held that such subsequent approval of the Secretary was sufficient.

Blauw vs. Love, 9 Kans. App. 55, 57 Pac. 258. This case involved a title resting upon both heirship of the Indian patentee and on partition proceedings in the State Court. The court held as follows, (quoting from the Syllabus):

"Where a patent conveying lands to an Indian under the pro-
" vision of law contained a proviso that 'said lands shall never be
" sold by the patentee or his heirs, without the consent of the secre-
" tary of the interior for the time being,' said patentee died, and
" the lands were partitioned among his heirs, and the one to whom
" the land in controversy was allotted sold and conveyed the same
" to another one of the heirs of the patentee, with the consent of
" the secretary of the interior, held that the Indian title thereto then
" became extinguished, and it could henceforth be transferred as
" other lands."

Stout vs. Simpson, 35 Okla. 129, 124 Pac. 754. In this case the only question involved was that of the construction of Section 9 of the Act of Congress of May 27, 1908, 35 St. L. 315, which provided "That the death of any allottee of the Five Civilized Tribes shall

"operate to remove all restrictions upon the alienation of said allot-
"tee's land; provided, that no conveyance of any interest of any
"full blood Indian heir in such land shall be valid unless
189 "approved by the court having jurisdiction of the settlement
"of the estate of said deceased Indian allottee." It will be noted that in that act Congress recognized the fact that the probate court of the state of which the Indian allottee was a resident had jurisdiction of the settlement of his estate upon his death. The statute did not confer such jurisdiction, it recognized and took notice of the fact that such jurisdiction existed.

It does not appear from the opinion in the Stout-Simpson case whether administration of the estate of the deceased al-ottee was had or not. It does appear, however, that the heirs of the deceased allottee conveyed the land with the approval of the court of the state which had jurisdiction of the settlement of the estate of the allottee, and the Supreme Court of Oklahoma held that by such conveyance a fee simple title passed and that the grantee obtained a good title.

Mullen vs. Short, 38 Okla. 33, 133 Pac. 230. This case involves the same act of Congress passed upon by the Supreme Court of Oklahoma in the case of Stout vs. Simpson, supra. The court held that the court of the state which had jurisdiction of the settlement of the estate of the deceased allottee had au-hority to approve a conveyance by an heir of the allottee whether a regular proceeding for the settlement of the estate of the allottee had been instituted or not
190 and that a conveyance of that character was valid.

We quote also the following from 22 Cyc., 137:

"Where the approval of the secretary of the interior or other officer "is required to a conveyance, it is a condition subsequent, and if "given at any time after the date of the conveyance it is retroactive "in effect and validates the original contract and intermediate con-"veyances. When it is once given the power of the officer is ex-"hausted; the permission or approval cannot be revoked; the Indian "title is extinguished, and the land may thenceforth be conveyed as "other lands."

We call the attention of the court particularly to the holdings in the cases last cited, with respect to the retroactive effect of an approval by an officer of the Federal Government authorized by the Acts of Congress to make such ap-roval of an Indian deed. This we do because of the attack on the sufficiency of a subsequent approval of such a deed made by the plaintiff at folio 339 of his brief.

Further consideration will be given in this brief to the question of the character of the title of the defendant, which is the first question stated by plaintiff at folio 257 of his brief for determination by this court.

191

II.

The Tender of a Deed.

The plaintiff at folio 257 of his brief states that the second question for decision by this court in this case is "Was respondent in a position to and did he convey by warranty deed, properly tendered to ap-

pellant, the South half (S. ½) of Section twenty-one (21), in Township one hundred and eight (108) North, of Range seventy-two (72) West, in Buffalo County, South Dakota, by a good and merchantable title, which premises it is admitted appellant purchased from respondent on April 15, 1911." Whether or not respondent was in a position to convey this land by warranty deed to the appellant with good and merchantable title depends, of course, upon the character of the title. That particular question has been heretofore discussed in this brief and further comments upon it will be made later. At this point we are concerned with the question of a tender of a deed by the defendant to the plaintiff, which question is discussed at folio 342 of the brief for plaintiff. No authorities are cited by the plaintiff in that discussion.

It will be remembered that the contract between the plaintiff and defendant, Exhibit E, copied at folio 71 of the brief for plaintiff,

192 provides that the abstract shall be furnished and the deed delivered when the payment of the balance of the purchase price of three thousand dollars is made. According to the statement contained in the brief of the plaintiff, a tender of the said sum of three thousand dollars by him to the defendant in performance of the contract, so far as plaintiff was concerned, was waived by the defendant. As, however, will appear from the additional statement made in an earlier part of this brief for the defendant based upon page 48 and the following pages of the record in the case, the testimony of the plaintiff with respect to such a waiver was squarely contradicted by the defendant. The testimony offered by the clerks of the plaintiff, as will appear on an examination of it, is not really corroborative on that point. It can hardly be called even cumulative. A stranger to the entire transaction could testify as well. It is evident that the trial court in its decision considered the testimony of these clerks as wholly immaterial.

As will appear from page 50 of the record, and as shown in the additional statement made in an earlier part of this brief, the defendant, when he took the abstract of title to the land to the plaintiff, told him, the plaintiff, that he, the defendant, had with him the deed and was there ready to settle, and the plaintiff then told the defendant that he had not examined the abstract of title, and the defendant

193 thereupon left the abstract with the plaintiff. The said testimony of the defendant to the effect that he told the plaintiff at that time that he had with him the deed and was ready to settle was not in any respect denied or controverted by the plaintiff.

We contend, therefore, in the first place, that a sufficient tender of a deed was made by the defendant to the plaintiff.

Sections 1162, 1167 and 1176 of the Civil Code of the State of South Dakota, which have some bearing on this particular question, are as follows:

"§ 1162. The thing to be delivered, if any, need not in any case "be actually produced upon an offer of performance, unless the "offer is accepted."

"§ 1167. All objections to the mode of an offer of performance, "which the creditor has an opportunity to state at the time to the "person making the offer, and which could be then obviated by him, "are waived by the creditor, if not then stated."

"§ 1176. A refusal by a creditor to accept performance, made
" before an offer thereof, is equivalent to an offer and refusal, unless,
" before performance is actually due, he gives notice to the debtor of
" his willingness to accept it."

Under the provisions of said Section 1162 it was not incumbent upon the defendant to produce the deed and formally tender it to the plaintiff unless the plaintiff indicated that he was prepared to make a settlement at that time. The plaintiff did not make
194 any objections to the offer of performance of the contract made by the defendant at the time the defendant took the abstract to the plaintiff and told him that he had the deed with him and was there ready to settle. The plaintiff stated that he had not yet examined the abstract and the abstract was, therefore, left with him.

As stated by Maupin on Marketable Title to Real Estate (2nd Ed.) Section 86, at page 202: "Tender of performance by the vendor does
" not mean in every case the actual production and tender of a deed;
" if the purchaser himself does not tender performance, it is sufficient
" for the preservation of the rights of the vendor that he is able and
" willing to execute, and offers to execute and deliver, such a convey-
" ance as the contract requires."

The defendant, by his statement to the plaintiff, and by his acts at the time he took the abstract to the plaintiff and told him that he had the deed there with him and was ready to settle, certainly placed himself within the protection of that rule.

We contend, also, that with respect to this question any other or more formal tender of the deed by the defendant was not neces-ary, as the plaintiff had waived such a tender.

In the letter written by plaintiff to defendant under date of March 4, 1912, Exhibit F, copied at folio 75 of the brief for plaintiff,
195 plaintiff stated that the defendant was unable to deliver to him a merchantable title according to the contract, and in the letter written by the plaintiff to defendant under date of March 12, 1912, Exhibit D, copied at folio 45 of the brief for plaintiff, the plaintiff stated that the title to the land was not merchantable and could not be made so, that the defendant did not possess a merchantable title and could not convey one and asked for the return of the sum of one thousand dollars, paid by the plaintiff at the time the contract was made. That letter of March 12th certainly was a notification to the defendant that the plaintiff would not take the land. That it was so considered by the plaintiff appears from his next letter to the defendant, written under date of April 15, 1912, Exhibit G, copied at folio 77 of the brief for plaintiff.

As stated in Maupin on Marketable Title to Real Estate (2nd Ed.) Section 88 at pages 205 and 207: "The rule that the vendor must
" tender performance in order to put the purchaser in default does
" not apply * * * where the purchaser declares that he will not
" accept a deed." This, however, is elementary.

In the case of Blanton vs. Kentucky Distilleries and Warehouse Company, 120 Fed. 318, the court held (quoting from the Syllabus):
" A tender of a deed by a vendor is not essential, to enable
196 " him to maintain a suit for specific performance, where the
" purchaser has notified him that he will not comply with the

"contract." Of course, the vendor would have the benefit of this same rule in a suit brought by the vendee to rescind the contract or to recover the deposit made on account of the purchase price.

The case of Gray vs. Smith, 83 Fed. 824, sustains this rule and a careful reading of it will show that it upholds as well the contention of the defendants on other points involved in the case at bar.

In the case of Bucklen vs. Hasterlik, 155 Ill. 423, the court held (quoting from the Syllabus): "A vendor, under a contract requiring "him to tender a good abstract of title is not bound, prior to the "acceptance of the title tendered, to make a tender of a deed to the "purchaser, in order to entitle him to the earnest money upon the "purchaser's failure to perform.

"In the case of Teal vs. Langsdale, 78 Ind. 339, the court held "(quoting from the Syllabus): In an action to rescind a contract "for the purchase of real estate, and to recover back the purchase "money paid, on the ground that the defendant did not convey at "the time stipulated, and has no title, it is not necessary, in order "to defeat the action, that the defendant with his answer should

"bring a deed into court for the plaintiff. It is enough to
197 "show that he is not in default." The court held that as the action brought by the appellant was one seeking a rescission on the ground that the appellee did not and was not able to convey at the time stipulated, the burden of both propositions was upon the appellant. So we say that in the case at bar, which is in effect an action of rescission, the plaintiff, Egan, did not show that the defendant, McDonald, was unable to convey a merchantable title, according to the contract.

In fact, without regard to the cases just cited, we consider the decisions of this Court in the cases of Brace vs. Doble, 3 S. D. 110-116, and McPherson vs. Fargo, 10 S. D. 611-619, ample authority to sustain our contention that as the plaintiff had refused to perform the contract a tender of a deed was not necessary.

It is possible in this connection that the plaintiff may be of the opinion that a sufficient tender of a deed was not made by the defendant on or about the 1st day of March, when he called upon the plaintiff with the abstract and told him that he had the deed with him and was there ready to settle, and that, therefore, as no tender was made to him subsequent to that time and prior to the commencement of this action, and as the plaintiff did not in writing

prior to his letter of March 12th, 1912, to the defendant re-
198 fuse absolutely the title, that if the acts and statements of the defendant on March 1st did not constitute a sufficient tender of the deed no tender was made. So far as this contention on the part of the plaintiff, if it should be made, is concerned, it will suffice to say, and this will apply as well to some other features of the case at bar, that the contract between these parties for the sale of the land, Exhibit E, copied at folio 71 of the brief for plaintiff, did not contain any provision making time an essential element of it. The defendant, therefore, was not, either by the contract or by any action taken by the plaintiff prior to March 12th, 1912, at least, required to perform or tender performance of the contract at

the time the plaintiff insists he was. Time not being an essential element of the contract, and not having been made so by any act of either of the parties to it, at least prior to March 12th, 1912, the defendant was not required, either for the protection of his own interests in the premises or by reason of any legal obligation to the plaintiff, to tender to the plaintiff prior to the receipt of the said letter of the plaintiff of March 12th, 1912, Exhibit D, copied at folio 45 of the brief for plaintiff, a deed of the land, or, for that matter, an abstract of title to the land, and when the plaintiff wrote and sent to the defendant the said letter of March 12th, 1912, the plaintiff legally waived the necessity of any tender thereafter by the defendant of a deed.

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III.

Errors Assigned by Appellant.

It appears from an examination of the assignments of error appearing at folio 235 of the brief for plaintiff, at least such of them as are properly assigned, that all of them that are argued have to do with some phase or other of the two questions stated by the plaintiff at folio 257 of his brief and which he states at folio 258 of his brief are the only questions before the court on this appeal. We do not consider it necessary to take up and treat specifically each of his assignments of error. Those that he has not specifically referred to or argued we assume are abandoned. What appears in the brief of plaintiff by way of specific argument of assignments of error, at folios 356 to 366 inclusive, is a summary which has been answered in the preceding part of this brief.

The plaintiff, however, in the concluding portion of his brief refers to the cases of the United States vs. Payne, Fed. Cases 16014, 4 Dill. 387, and the United States vs. Shanks, 15 Minn. 369, in addition to the case of McKay vs. Kalyton, 204 U. S. 458. These citations serve to call attention to the letter of opinion on the abstract of title written by the witness, E. E. Pierson, plaintiff's Exhibit "B," referred to and copied in part at folio 38 of the brief for plain-

200 tiff and heretofore copied in full in this brief. We wish to make some comments upon this letter of opinion as the plaintiff presumably relied upon it in rejecting the title.

In the letter of opinion, immediately following the words "retained by the government" printed in folio 40 of the brief for plaintiff, Pierson used the following language.

"After the death of Weazel, his heirs, under and by virtue of his "said trust patent, might divest themselves of their equitable title "in said lands by an Indian inheritance deed and upon its approval "by the United States government through its Secretary of the In- "terior, the legal title as well would pass into their grantee."

Evidently, therefore, Pierson knew of the existence of Section 7 of the Act of Congress of 1902, hereinbefore referred to, 32 St. L. 275.

In addition to what we have heretofore stated we will comment briefly on the cases cited by Pierson in his opinion in order to show that it was not well founded in law.

So far as the case of the United States vs. Payne, 4 Dill. 387, Fed. Cases 16014, is concerned, in which case the court held that without the assent of the general government the probate court of a state has no jurisdiction to administer upon the property or credits of Indians who were members of a tribe which maintains to-
201 wards the United States its tribal relations, it will suffice to say that this was not the situation in the case at bar. Weazel had become a citizen of the State of South Dakota as well as a citizen of the United States.

In the case of the United States vs. Shanks, 15 Minn. 369, there was involved the consideration of a treaty of a band of Indians with the United States. The court held that under the treaty the Indian whose estate was involved was neither a citizen of Minnesota nor of the United States. Weasel was both. The case, therefore in no way affects the case at bar.

Pierson cites the case of Meeker vs. Kaelin, 173 Fed. 216, as holding that "on the death of a tribal Indian, his property descends " in accordance with the customs of his tribe and not in accordance " with the laws of descent as prescribed by the state code." The court did not so hold. What it did hold (paragraph three of the syllabus) was—"So long as Indian tribal relations were maintained " prior to the Indians becoming citizens of the United States, the " rules of descent of Indian property would be governed by the " customs of the Indians, if such customs existed, subject, however, " to treaty provisions."

In the Meeker-Kaelin case the provisions of a treaty between an Indian tribe and the United States were also involved. It will
202 be remembered that the allottee, Weazel, in the case at bar was a citizen of both the United States and the State of South Dakota. The case of Meeker vs. Kaelin, as a matter of fact, is a good authority, when it is analyzed, for the defendant in the case at bar.

What we have just said with regard to the case of Meeker vs. Kaelin applies as well to the case of Y-Ta-Tah-Waah vs. Rebock, 105 Fed. 257, cited by Pierson. The Indian in that case was a tribal Indian in the charge of the Indian agent upon his reservation. He was not subject to the laws of the state and on his death, of course, the state laws of descent and distribution did not apply. None of the congressional legislation involved in the case at bar was involved or considered in that case.

Pierson cites a decision of the United States Circuit Court in Iowa in 1900 in support of his position. The case is not named, but evidently it is of the same character as the case of Meeker vs. Kaelin, supra.

The only other case cited by Pierson in his letter of opinion is that of McKay vs. Kalyton, 204 U. S. 458, which he cites as sustaining the proposition that "a state court has no jurisdiction of a controversy " necessarily involving a determination of the title, and incidentally

" of right of possession of Indian allotments while the same are held
" in trust by the United States."

203 That is not a correct statement of the holding in the case of McKay vs. Kalyton. What the Supreme Court of the United States did hold in that case, as we have hereinbefore shown is (quoting the second paragraph of the syllabus): "That the United " States has retained such control over the allotments to Indians that, " except as provided by acts of Congress, controversies involving the " determination of title to, and right to possession of, Indian allot- " ments while the same are held in trust by the United States are not " primarily cognizable by any court, state or Federal."

When the Secretary of the Interior approved the sale by the heirs of the deceased allottee, Weazel, to Huston the United States ceased to hold the land in question in trust and, as provided by section 7 of the said Act of Congress of 1902, the title became freed from any restrictions on the right of alienation of it by the heirs of Weazel.

IV.

Cases Cited by Appellant Distinguished.

At folio 278 of his brief, plaintiff cites the case of the United States vs. Kagama, 118 U. S. 375, and at folio 281 cites the case of Beecher vs. Weatherby, 95 U. S. 525. So far as these cases are concerned it will sufficie to say that the former was decided in 1886 and the latter in 1877, both, therefore, prior to the passage of the Indian

204 General Allotment Act in 1887 and of course prior to any of the statutory legislation involved in the case at bar.

With the case of the United States vs. Rickert, 188 U. S. 432, cited at folio 283 of the brief for plaintiff, we have no contention. None of the questions which are in fact involved in the case at bar were considered by the Supreme Court of the United States in that case. The case was decided in 1903 and arose prior to the enactment of Section 7 of the General Indian Appropriation Bill of 1902, 32 St. L. 275, which section, as has been pointed out in earlier portions of this brief, is the statute particularly involved in the case at bar, and which statute is not mentioned, so far as we have been able to observe, in the brief for the plaintiff.

In the case of Beck vs. Flournoy Live Stock and Real Estate Company, 65 Fed. 30, cited at folios 298 and 342 of the brief for plaintiff, no question of heirship was involved. The case involved only the validity of a lease made by the allottee during the twenty-five year period covered by the trust patent issued under the Indian General Allotment Act of 1887. The court held that the citizenship bestowed on the Indians by the General Allotment Act was in no way inconsistent with the restriction upon their title to their lands and that the lease obtained by the defendant Company was void. The right of the heirs of the allottee to sell the land was in no way

205 involved in that case and the case of course arose and was decided long prior to the enactment of said Section 7 of the Act of 1902, 32 St. L. 275.

In the case of Williams vs. Steinmetz, (Okla.), 82 Pac. 986, cited at folio 302 of the brief for plaintiff, practically the same questions

were involved as in the Beck-Flourney case, ante. The rights of heirs of the allottee were in no way considered by the courts.

The plaintiff, at folio 312 of his brief, lays considerable stress on the case of Jackson vs. Thompson, (Wash.) 80 Pac. 454, cited also at folios 306 and 337 of the brief. All that the court held in that case was (quoting from the *Sybilla*): "A restriction on alienation " in a deed of the United States to its Indian wards, pursuant to " treaty stipulations made between the Government and the Indians, " is valid. A deed by the United States to an Indian ward forbidding " alienation deprives the grantee of the power to dispose of the prop- " erty by will." Undoubtedly those holdings were correct. They do not, however, affect the case at bar and do not hold that Congress has not the right to remove the restrictions upon alienation even during the life of the grantee or during the term of the trust period. Nor do they hold that Congress has not the right to provide that a
206 fee simple title to the allotted land shall pass to the heirs of the deceased allottee or the deceased grantee from the United States or that such heirs may convey a title in fee simple with or without the approval of the United States, as Congress may see fit to provide by law.

The — of Bird vs. Winyer, (Wash.), 64 Pac. 178, cited at folio 313 of the brief for plaintiff, so far as it had to do with Congressional legislation treated of only legislation of that character enacted prior to the passage of the Indian General Allotment Act in 1887. None of the questions actually involved in the case at bar were considered in that case.

At folio 317 of his brief plaintiff cites the case of McKay vs. Kalyton, 204 U. S. 458, and reference is again made to the case at folio 360 of the brief. This case is one of the leading decisions of the Supreme Court of the United States with reference to Indian Allotments. It will appear, however, from a careful examination of the case, which was decided in 1907, that it is in no way an authority for the plaintiff in the case at bar and in no way affects the case at bar.

The case of McKay vs. Kalyton, as appears from page 467 of the opinion, was commenced in 1899 and therefore prior to the enactment of said Section 7 of the Act of 1902, 32 St. L. 275, on which, as we have hitherto shown, the title of the defendant in the case at bar is based.

207 The syllabus in the McKay-Kalyton case is as follows:

"Although the Federal right was first claimed in the state " court in the petition for *h*ehearing, if the question was raised, was " necessarily involved, and was considered and decided adversely by " the state court, this court has jurisdiction under § 709, Rev. Stat.

"The United States has retained such control over the allotments " to Indians that, except as provided by acts of Congress, contro- " versies involving the determination of title to, and right to pos- " session of, Indian allotments while the same are held in trust by " the United States are not primarily cognizable by any court, state " or Federal.

"The act of August 15, 1894, 28 Stat. 286, delegating to Federal " courts the power to determine questions involving the rights of In- " dians to allotments did not confer upon state courts authority to

"pass upon any questions over which they did not have jurisdiction "prior to the passage of such act, either as to title to the allotment, or "the mere possession thereof which is of necessity dependent upon "the title."

These points were, therefore, decided in that case. The first point is merely a question of practice. The second point (the holding in the second paragraph of the syllabus) is not pertinent to
208 the case at bar because no controversy involving the determination of the title to and right of possession of the allotment to Hin-tin-ka-sau or Weazel arose while the allotment was held in trust by the United States. In fact a controversy of that character has never arisen. Under the act more particularly construed in the McKay-Kalyton case, the act of Congress of August 15, 1894, Ch. 290, 28 St. L. 286, described at page 467 of the opinion, provision was made for the maintaining of an action in the Circuit Court of the United States by any person in whole or in part of Indian blood or descent to determine his right to or in the allotment. In the case at bar, that of Egan vs. McDonald, the right of any person who is in whole or in part of Indian blood or descent to the Weazel allotment is not involved and never has been questioned. No controversy affecting the right to the possession or ownership of the land so far as any of the heirs of Weazel are concerned has arisen. The act of Congress of 1902, 32 St. L. 275, above referred to, under the provisions of Section 7 of which Act the title to the land of the defendant in the case at bar was derived, was not in force when the McKay-Kalyton controversy arose and therefore the heirs of the allottee, Kalyton, were unauthorized to sell the land which had been allotted to him and the United States was compelled to continue to
209 hold the land in trust until the expiration of the twenty-five year period provided for in the trust patent issued to Kalyton. Congress in enacting said Section 7, 32 St. L. 275, in 1902 abrogated the trust created by former legislation and mentioned in the patent to Weazel, the termination of the trust to become effective at such time as the heirs of Weazel might see fit to sell the allotted land with the approval of the Secretary of Interior. This could not have been done in the McKay-Kalyton case as when that case arose there was no law in force providing for such a sale.

It may possibly be that under the act of Congress of August 15, 1894, 28 St. L. 286, construed in the McKay-Kalyton case an heir of Weazel other than the three heirs who executed the deed to Huston (if there were such an heir) could maintain suit in the United States District Court to recover his share of the allotment. But that is not material. The in-estate of such an heir; that is to say Weazel, the allottee, was at the time of his death, a citizen of the state of South Dakota and a resident of the county of Buffalo therein. The county court of that county therefore had undoubted jurisdiction to administer his estate and to determine, at least in the first instance, (which determination would stand unless reversed) his heirs. This that court did, and the deed made by such heirs was approved by the Secretary of the Interior as provided by Section 7 of said Act
210 of 1902, 32 St. L. 275. The children of Weazel were also citizens of South Dakota and were as much bound by the

said decree of the county court of the County of Buffalo finding heirship as they would be bound if they were of whole white blood.

Said Section 7 of the act of Congress of 1902, 32 St. L. 275, clearly provides that the sale of the allotment by the heirs of the deceased allottee with the approval of the Secretary of Interior shall end the trust period forthwith and pass an absolute title in fee. If said Section 7 had never been enacted the case of McKay-Kalyton would apply to any controversy regarding the allotment of the character described in the act of August 15, 1894, 28 St. L. 286-305 (copied at page 467 of the opinion in that case). The case at bar of Egan vs. McDonald however is not such a case. No such case has arisen.

As suggested above, the case of McKay vs. Kalyton must now be read and applied in the light of the subsequent legislation of Congress, particularly said section 7 of the Act of 1902, 32 St. L. 275, which was in no way involved or considered in that case.

What has been said above with reference to this case (McKay vs. Kalyton) applies as well to the third paragraph of the syllabus in the case above quoted. That case applies only to allotted
211 lands to which the United States still holds the title in trust. When the land is sold by the heirs of the deceased allottee with the approval of the Secretary of the Interior, as provided by said section 7, 32 St. L. 275, the trust is terminated because the title so conveyed is "a full title" (that is to say a title in fee) and "without restriction upon alienation."

The case of Minder, as sheriff, vs. First National Bank of Sisseton, 22 S. D. 14, 114 N. W. 1094, cited at folio 319 of the brief for plaintiff, had to do only with the disposition of the proceeds of the sale of allotted land of a deceased Indian of the Sisseton band under an act of Congress authorizing such a sale, which act is in no way involved in the case at bar. The court held that under the acts of Congress governing such a sale the proceeds of the sale were not subject to taxation by the state.

The cases of Case vs. Hall, 46 S. W. 180, Hockett vs. Alston, 58 S. W. 675, Turner vs. Gilliland, 76 S. W. 253 and Hastings vs. Whitmer, 51 S. W. 967, cited at folio 322 of brief for plaintiff, were cases arising in the Indian Territory and had to do only with laws in force in that Territory applicable only to the citizens of the Cherokee, Choctaw and Chickasaw nations. This clearly appears from the opinions in those cases which are in no way applicable to the case at bar.

212 The case of Pound vs. Pullan (Tenn.) 3 Yerg. 338 cited at folio 322 of the brief of plaintiff was decided by the Supreme Court of Tennessee in 1832 and has nothing whatever to do with Indian allotments or with the disposition of allotted lands.

The case of Lone Wolf vs. Hitchcock, 187 U. S. 553, cited at folio 323 of the brief for plaintiff, in no way affects the case at bar. The question involved was the effect so far as the courts were concerned of legislation enacted by Congress when it was claimed in the courts such legislation was not pursuant to a treaty between an Indian tribe and the United States.

In the case of Nelson vs. John, 86 Pac., 933, cited at folios 324 and 341 of the brief for plaintiff, the court merely held that the restric-

tions upon alienation contained in a patent issued to an Indian allottee prior to the enactment of the Indian General Allotment Act, 24 St. L. 388, were not repealed by that act. That holding was correct. That question, however, is not in the case. Congress, as has been shown, did modify the restrictions on alienation contained in the patent involved in the case at bar by the Act of 1902, 32 St. L. 275.

What we have just said with regard to the case of Nelson
213 vs. John applies as well to the case of Starr vs. Long Jim, 100 Pac. 194, cited at folio 325 of the brief for plaintiff.

In the case of Colombe vs. Wilson, 29 S. D. 49, 135 N. W. 668, cited at folio 328 of the brief for plaintiff, the holding of this court is of course, entirely correct. That holding, however, in no way affects the case at bar because in the Colombe-Wilson case the interest in the land asserted by the defendants was under a contract made with the plaintiff who was the allottee. The question of heirship in no way entered into the case.

In the case of Bowling vs. United States, 191 Fed. 19, and Goodrum vs. Buffalo, 162 Fed. 817, cited at folio 337 of brief for plaintiff, the said act of Congress of 1902, 32 St. L. 275, through which the title of the defendant in the case at bar, as has been shown, was derived, was in no way involved or cited by the court.

The cases of Frazee vs. Spokane County, 69 Pac. 779, United States vs. Flournoy L. & R. Co., 69 Fed. 886, Pilgrim vs. Beck, 69 Fed. 895, and Beck vs. Flournoy Real Estate Company, 65 Fed. 30, cited at folio 341 of brief of plaintiff arose prior to the passage of said act of Congress of 1902, 32 St. L. 275.

The foregoing are all of the cases cited in the brief for plaintiff except three cited at folio 360. Those three cases will be
214 discussed later in this brief.

V.

The Action Was Prematurely Brought.

One of the principal qualifications of the rule that the purchaser may recover back the purchase money on failure of the title is that the right so to do does not exist where the vendor has a right to perfect the title. Maupin on Marketable Title to Real Estate (2nd Ed.) section 241, at page 591, and section 309, at page 798.

In the case at bar the defendant did not concede that the title was not marketable. The plaintiff contends of course that the defendant acquiesced in this but the defendant, as we have shown, clearly contradicted in his testimony the testimony of the plaintiff on that point. It will be remembered that time was not made by the contract for the sale of the land an essential feature of the contract. It will be remembered also that the record shows that there was tendered to the plaintiff on the first trial of the action in December, 1912, a deed to the property, with an abstract of title continued to date which showed the record in the office of the register of deeds of Buffalo

County of a certified copy of the judgment quieting and perfecting in the defendant the title to the property against all claims rendered in an action which had been conducted by the defendant
215 for that purpose in the Circuit Court of Buffalo County. The plaintiff refused the tender and the court sustained objections made by the plaintiff to the introduction in evidence by the defendant of such certified copy of the judgment quieting the title to the property and of such completed abstract of title. It will also be remembered that, as appears from the stipulation regarding evidence with respect to the second trial, which stipulation is shown at folio 206 of the brief for plaintiff, that on January 6, 1914, (and therefore more than a month prior to the second trial, which was had on February 19, 1914,) the defendant again tendered to the plaintiff such deed and abstract and that the court on the second trial sustained the objection of the plaintiff to the evidence offered by the defendant of such tender and of the demand for performance of the contract by the plaintiff made at the time.

With regard to the right of the vendor to perfect the title to real property after the time fixed for completing the contract we cite Maupin on Marketable Title to Real Estate, in section 309 of which at page 798, the rule is stated as follows:

"If the time for completing the contract has elapsed, the "vendor may nevertheless insist upon his right to perfect the title, "except in certain cases hereafter to be mentioned. As a
216 "general rule it is sufficient if he be able to convey a good "title at any time before decree in any proceeding in which "it is sought to rescind or to enforce the contract." Many cases are cited by the author to sustain the rule as stated.

We do not wish the court for a moment to gain the impression from this portion of our brief that there is any doubt in our minds of the fact that the title of the defendant to the land in question was marketable on the first day of March, 1912, and that the abstract which was considered by the plaintiff, that is to say, the second abstract, and rejected by him showed a marketable title. In our opinion the suit which the defendant brought in the Circuit Court of Buffalo County to perfect his title against unknown claimants and which he conducted to judgment was not necessary to perfect the title. The suit was brought, however, not because it was necessary but in order to satisfy the objections which had been made by the plaintiff in the case at bar. The suit was prosecuted with due diligence and was not completed until just before the first trial of the action, on which trial a deed and an abstract of title showing the record in the office of the register of deeds of Buffalo County of a certified copy of the judgment in such suit were tendered to the plaintiff and refused. There is no testimony in the record that the plaintiff has suffered any damages because of delay by the de-
217 fendant in performing the contract. Such delay as a matter of fact did not exist because the second abstract submitted to the plaintiff on or about March 7, 1912, showed a marketable title. If, however, it be conceded that from the standpoint of the plaintiff

the defendant did delay, until the tender of the deed and abstract on the first trial of the action, the performance of the contract there is no evidence that the plaintiff was damaged by such delay. In fact there could not well be such evidence as the only damage that would be possible under the circumstances would be the interest on that portion of the purchase price which had been paid, and that of course could easily be adjusted.

Many cases are cited by Maupin to sustain the rules above quoted. In addition to those cases and as bearing on this question we also cite the following:

Longworth vs. Taylor, 1 McLean, 395, Fed. Cases 8490.
Hobson vs. Buchanan, 96 N. C. 444, 2 S. E. 180.
Mitchell vs. Allen, 69 Tex. 70, 6 S. W. 745.
Moss vs. Hanson, 17 Pa. St. 379.
Allstead vs. Nichol, 123 Cal. 594.
Kimball vs. Bell, 49 Kans. 173, 28 Pac. 1015.

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VI.

The Title Was Free From Reasonable Doubt, and Therefore Marketable.

It will be remembered that the plaintiff does not claim that the grantors in the deed to Huston are not heirs of the deceased allottee, nor does he claim that there are any heirs of the allottee besides the said grantors. His contention is that the County Court of Buffalo County was without jurisdiction in the premises, that is to say, without jurisdiction to administer the estate of the deceased allottee, Weazel, and that, therefore, its determination of the heirship and its finding that the said grantors were the only heirs of Weazel were of no legal effect.

In other words, the position of the plaintiff is that there is no competent evidence sufficient to make the title of the defendant marketable with respect to the question of the identity of the grantors in the deed to Huston with the sole heirs of Weazel. We believe that we have clearly established the fact that the County Court of Buffalo County had jurisdiction to administer the estate of Weazel. If it had that jurisdiction it necessarily follows that its finding of heirship is a sufficient determination of the heirship, unless reversed on appeal, or unless nullified by some legal proceeding, and until so reversed or nullified it is sufficient and binding upon a pur-
219 chaser, so far as the question of the marketability of a title depending upon heirship is concerned.

We may frankly say to the court that we would contend in this connection that even if the County Court of Buffalo County were wholly without jurisdiction to administer the estate of Weazel or to determine for any purpose who were his heirs, that nevertheless the showing which was made in the case at bar by the second abstract of title submitted to the plaintiff on or about the 7th day of March, 1912, was such that the plaintiff could not legally reject the title on the ground that it was not merchantable.

We of course concede that the title in question, to use the language of Section 2347 of the Civil Code of the State, must be "free from reasonable doubt." A marketable title must be a title which is free from reasonable doubt. If a title is free from reasonable doubt it is marketable. These are elementary propositions.

If the objection of the plaintiff to the title in question is analyzed it will appear that the only doubt which there can be as to the sufficiency of the title is the inference to be drawn from the statements (not the evidence) of the plaintiff that there may be one or more heirs of Weazel besides the grantors in the deed to
220 Huston. Is any doubt based upon such an inference reasonable? We contend that it is not.

The doubt certainly is not reasonable if the County Court of Buffalo County had jurisdiction to administer the estate of Weazel. If that court did not have such jurisdiction we have a showing in support of the title consisting of, first, the finding of that court in the decree of distribution, which it had in fact made, that the heirs were the persons who sold and conveyed the land, and, second, a deed in which the grantors described themselves as the sole heirs of the deceased allottee, Weazel, which deed was confirmed by the Secretary of the Interior. Certainly this is a reasonable showing. Certainly it constitutes a prima facie showing of ownership in the grantors in the deed to Huston. There can be no other presumption in the absence of evidence to the contrary, and there is no such evidence. The said showing is sufficient, therefore, so far as that particular objection is concerned, to make the title marketable.

As this title stood and as shown by the said second abstract, submitted to the plaintiff on or about March 7, 1912, there was no way in which the title of the defendant could be attacked except by litigation. There was nothing shown by the abstract and there has been nothing shown since in any way to indicate that such an
221 attack upon the title, that is to say, such litigation, was or is probable.

As stated in Maupin on Marketable Title to Real Estate:

"The purchaser cannot demand a title absolutely free from all sus-
" picion or possible defect." (Page 707.)

"It must be observed, however, that a title is not necessarily doubt-
" ful simply because it requires to be supported by parol testimony.
" As a general rule, for example, title by inheritance depends prin-
" cipally upon matters in pais, or facts resting in the knowledge of
" witnesses. If those facts be clearly sufficient to establish the right
" of the vendor as heir, it is apprehended that the purchaser could
" not object to the title simply because it could not be established by
" record evidence, but a different case is presented where the fact
" of inheritance itself is in doubt. There may be circumstances to
" show that the ancestor is not dead, or that he has left a will, or that
" the vendor is not sole heir. Then it is that the title becomes unmar-
" ketable from the necessity of parol proof to remove the doubts
" which surround it." (Page 728.)

Fry, in his work on Specific Performance, makes a classification of cases in which the title will not be held doubtful. This
222 classification is copied in Section 285 of Maupin on Marketable Title to Real Estate, at page 713, and among such cases is

that, "Where probability of litigation ensuing against the purchaser " in respect to the doubt is not great. The court, to use Lord Hard- " wicke's language in one case, 'must govern itself by a moral cer- " tainty, for it is impossible in the nature of things there should be " a mathematical certainty of a good title.' "

VII.

Opinion of the Circuit Judge in Granting a New Trial.

It will be remembered that at the conclusion of the first trial of this case in the Circuit Court the motion of the plaintiff for a directed verdict was granted and that thereafter the Circuit Court granted the motion of the defendant for a new trial. In granting this motion for a new trial Judge Joseph W. Jones prepared a brief memorandum showing the reason why he granted the motion. Thinking that the position taken by Judge Jones with respect to the questions involved in this case may be of interest to this court, we copy his memorandum opinion in granting the new trial, as follows:

"I have given this case a more ample consideration than was possi-
" ble at the trial, and now reach the conclusion that the
223 " abstract referred to by Mr. Pierson in his opinion did show
" a marketable title. The abstract showed first, a trust patent " from the United States to the Indian named Weazel as allotted " under the general Allotment Act of 1887; 2nd, a deed from all the " heirs, as therein claimed, of Weasel to Huston, bearing the in- " dorsement of ap-roval of the Secretary of the Interior; and third, " a deed from Huston to the defendant; fourth, a decree of the " County Court of Buffalo County, South Dakota, purporting to de- " termine the heirs of Weasel. United States vs. Park Land Co., 188 " Federal 383; and United States Fidelity & Guaranty Co. vs. Han- " son (Oklahoma) 129 Pacific 60, directly sustaine- the theory that " the Court had jurisdiction, and I find no case to the contrary " arising upon facts subsequent to the act of 1892 which permits " alienation by the heirs of an Indian allottee. But even if it should " be held that the County Court was without jurisdiction, the con- " clusion, in my opinion would be the same. The deed of the heirs " was not effective for any purpose until approved by the Secretary " of the Interior, and when approved by him, conveyed 'A full title " to the purchaser, the same as if a final patent without restriction " upon the alienation, had been issued to the allottee." This power
" conferred by statute upon the Secretary of the Interior nec-
224 " essarily carried with it the power to determine the fact that
" the allottee was dead, and who were his heirs. Such implied " power in the secretary is in harmony with the entire system of our " public land laws.

"It is to be observed that the title to the land comes from the " United States, it being the holder of the legal title, and holding " the same as trustee for the allottee and his heirs, and relinquishing " such trust only by the act of the Secretary of the Interior in ap- " proving the deed of the heirs of the allottee. I am of opinion that " without the determination of any court, the deed reciting that the

" grantors are the only heirs of Weasel, and bearing the endorse-
" ment of the approval of the Secretary of the Interior is prima facie
" evidence of heirship.

"Motion for new trial will be granted on the ground and for the
" reason that the Court erred in refusing to direct a verdict for de-
" fendant, and in sustaining the motion to direct a verdict for
" plaintiff."

J. W. JONES.

VIII.

The Action is One at Law and the Plaintiff Has Failed to Sustain It.

A good deal that has been said in this brief could properly be repeated under this topic. There is, however, one particular point in this connection to which we wish to call attention. It will of
225 course be remembered that though the action was tried to the court a jury was waived, and that it is an action at law, as distinguished from an action on the equitable side of the court. The point to which we now call attention is the rule which is well stated in the Syllabus in the case of Bayliss vs. Stimson, 53 N. Y. Superior Court Reports, 225, as follows:

"In an action at law by the vendee, to recover back earnest money
" paid and for damages, by reason of the breach of a contract for the
" assignment of a lease, in that the title offered was not such as he
" was bound to accept, the doctrine that obtains in equity as to un-
" marketable title has no application. The plaintiff in such action is
" bound to show affirmatively that the title offered is not good.
" Proof that if certain facts exist, or that for other reasons the title
" is doubtful, is insufficient. This rule has not been changed by the
" Code."

We quote as follows from the opinion of the referee in that case at page 228, which was sustained in all respects by the court:

"In Sir Samuel Romilly vs. James (6 Taunt, 274), Gibbs, Chief
" Justice, says: 'It is said the plaintiff will have made out his claim
" to recover back his deposit if a cloud is cast upon the title. That is
" not so in a court of law. He must stand by the judgment of the
" court as they find the title to be, whether good or bad, and
226 " if it be good in the judgment of a court of law, he cannot re-
" cover back his deposit. I know a court of equity often says,
" this is a title, which though we think it available, is not one which
" we will compel an unwilling purchaser to take; but that distinction
" is not known in a court of law.' In 1831, in Boyman vs. Gutch (7
" Bing. 379), the court held to the same rule, although it was strongly
" urged by counsel that the purchaser seeking to recover his deposit
" should not be compelled to take a questionable title, and thus incur
" the hazard of purchasing a law suit.

" Since the adoption of the Code, and notwithstanding the sup-
" posed blending of legal and equitable rules, the same distinction
" has been maintained and applied in this state, and in the court in
" which this action is pending. In 1864, at the general term, in
" O'Reilly vs. King (2 Robt. 587), in an action to recover back the

"deposit on a contract of sale, claimed to have been rescinded for "doubtfulness of the vendor's title, the court held that the plaintiff "must hold the title to be actually bad, and not merely doubtful. "The same distinction has been recognized by the court of appeals. "In Murray vs. Harway (56 N. Y. 337) the action was to recover "back a deposit made on an executory contract for the sale of lease-
"hold premises. In the opinion of the court the rule in
227 "equity is considered and cases cited. The court then pro-
"ceeds to say: 'The citation of these authorities is not abso-"lutely necessary in the case at hand, for it is brought on the law "side of the court. The plaintiff proceeds on strictly legal rights. "He refuses to perform his contract and sues to recover back the "amount of a payment made thereon.' And the case is disposed of "on the ground that the defendant established by parol proof on the "trial that he had a good title."

And we quote the following from the opinion of the court in that case at page 232:

"There is a plain distinction between an action in equity for a spe-"cific performance, and an action at law for the recovery of money "paid on the execution of a contract of sale of land. In an action "for a specific performance, the rule is stated that equity will not "interfere and decree a specific performance unless the plaintiff "establishes to the satisfaction of the court that his title is a market-"able title; and it is said in Shriver vs. Shriver (86 N. Y. 584), that, "as a general rule, a title which is open to judicial doubt is not a "marketable title, and that if after the vendor has produced all the "proofs he can, a rational doubt still remains, the title is not market-"able; that a rational doubt may be said to exist when a court of law
"would not feel called upon to instruct a jury to find that a
228 "fact existed, on the existence of which the vendor's title
"depends.

* * * * * * *

"In an action at law, however, the plaintiff seeking to recover "either damages for the failure to perform the contract, or the "amount paid on the contract, is bound to show that the defendant "has broken the contract and that he (the plaintiff), had tendered "performance, or was able to perform the contract on his part. That "burden is on the plaintiff, the party seeking to recover. He is "bound to show that in some way the defendant has failed to per-"form his contract, and if he fail to sustain this burden, he cannot "recover. On strictly legal principles he has failed to prove his "cause of action."

The said case of Bayliss vs. Stimson, supra, was affirmed in all respects by the court of appeals of the State of New York in 110 N. Y. 621.

As sustaining this rule we cite also the following cases:

Murray vs. Harway, 56 N. Y. 337.

Mozer vs. Cochrane, 107 N. Y. 35.

Hollifield vs. Landrum, 31 Tex. Apps. 187, 71 S. W. 979.

In the case last cited the court of civil appeals of Texas held (quoting from the Syllabus):

229 "In an action on contract for the sale of land, where the "sellers are to pass good title, and furnish an abstract show-"ing the same, the burden is on the party refusing the title to show "that facts extraneous to the abstract are of such a nature as to "threaten and diminish the market value of the property."

So we say that in the case at bar the plaintiff has failed to show any facts whatever extraneous to the abstract submitted to him on or about March 7, 1912, Exhibit 2, of such a nature as to threaten and diminish the market value of this property. Possibilities are not sufficient. Probabilities which amount to moral certainties alone will suffice.

IX.

Conclusion.

The question in the case at bar is not, "Is, or on or about the 7th day of March, 1912, was, the title of the defendant absolutely perfect in that there is no possibility whatever of the title ever being successfully attacked?" for but few titles can accurately be said to be of that character. The question is, "Is the title marketable, that is to say, free from reasonable doubt?" In other words, is the title such that it is probably free from danger of a successful attack? On the record, the showing which has been made and the authorities cited, we contend that the court would not be warranted in holding

230 that there is any likelihood of a successful attack ever being made on the title.

It will be remembered that the objections of the plaintiff to the title went not so much to the sufficiency of the abstract, which, however, as has been shown, was sufficient, as they went to alleged inherent fatal defects in the title, which, it has been shown, did not exist. The plaintiff was, therefore, left and now stands without any valid objections to the title, or for that matter to the abstract. When the immaterial and irrelevant matters, which appear in the record in this case and have been brought to the attention of the court, are discarded and the case is closely analyzed, it will, we doubt not, appear to the court that the case is that of a contract, in which time was not an essential element, providing for a deed and a merchantable title to the purchaser, in which the tender of a deed by the vendor was waived and in which the title of the vendor is and was at the time it was submitted to the purchaser, and even before the purchaser endeavored to rescind the contract, good and merchantable.

The plaintiff, therefore, did not have the cause of action against the defendant set forth in his complaint, and it follows that

231 the order of the Circuit Court denying the motion of the plaintiff for a new trial should be affirmed.

Respectfully submitted,

BAILEY & VOORHEES,
Attorneys for Defendant and Respondent.

The defendant and respondent gives notice that he desires an oral argument in this case on the appeal.

BAILEY & VOORHEES,
Attorneys for Defendant and Respondent.

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232 And afterwards, to-wit, on the 30th day of October, 1914, the said plaintiff and appellant filed in this Court, with due proof of service upon the attorneys for the defendant and respondent endorsed thereon, his reply brief, as provided by the rules of this Court; and I hereby certify that the following is a true and correct copy of such reply brief as filed in this Court and as the same appears of record herein, to-wit:

233 In the Supreme Court of the State of South Dakota, October Term, A. D. 1914.

3643.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. MCDONALD, Defendant and Respondent.

Appeal from the Circuit Court of Minnehaha County.

Hon. Joseph W. Jones, Presiding Judge.

Appellant's Reply Brief.

George W. Egan, Sioux Falls, South Dakota, Attorney Pro Sese.
Bailey & Voorhees, Sioux Falls, South Dakota, Attorneys for Defendant and Respondent.

[Stamped on cover:] Supreme Court, State of South Dakota. Filed Oct. 30, 1914. E. F. Swartz, Clerk.

234 In the Supreme Court of the State of South Dakota, October Term, 1914.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Appeal from the Circuit Court of Minnehaha County.

Hon. Joseph W. Jones, Presiding Judge.

Appellant's Reply Brief.

In our reply to the argument of respondent in this case; we will not reiterate what we have already said in our opening argument, but will endeavor to answer the points advanced by respondent, and to commenting on the authorities cited by him in endeavoring to sustain them.

235 Respondent, at the outset of his argument, on page 39 of his brief contends that the abstract, Exhibit "2" shown at folio 113 of appellant's statement and brief showed a good and merchantable title to the property covered by it. Respondent, McDonald, at the time he delivered the abstract, however, did not consider the title as shown by the abstract was good. He testified on top of page 18, of respondent's additional abstract, in answer to appellant's question:

Q. You were satisfied, after March 1st there was something the matter with the title?

A. I was satisfied of some defects in the title in the first abstract."

The testimony of the plaintiff, George W. Egan, at pages 19 and 20 of appellant's statement and brief, shows that respondent McDonald admitted that he had no title to the land, saying "I don't know what to do. I cannot fix it up."

In fact, the subsequent conduct of defendant, as shown by the undisputed evidence shows that he did not consider he had a good title to the land, for it shows that he sent the abstract, after March 1st, 1912, when the deal was to have been closed, out to Buffalo County, to have it continued to show certain alleged probate proceedings; that he wrote to Major R. H. Summers, of Chamberlain, So. Dak.

236 (Exhibit "C" page 14 of statement), seeking his assistance in getting the title fixed; that after March 12th, 1912, he employed Hon. H. E. Judge, an attorney at Sioux Falls, to see what he could do towards fixing the title, by writing to Washington, D. C., and endeavoring to have the matter opened up under the Burke law; and that afterwards he tried to bolster up the title by a proceeding to quiet title in Buffalo County, although plaintiff had advised him, by his letter of March 12th, 1912, (Exhibit "D," statement page 15) that he did not consider the title good, and that it could not be made good.

Counsel for respondent has, on pages 41 to 50 of his brief set out much of the Congressional legislation of recent years relating, in any

manner, to Indian lands or allotments. Much of this legislation, however, does not pertain, in any manner to the case at bar. Respondent admits this, but states that it is cited merely to show that the government is abandoning, to a great extent, its policy of treating the Indians as its wards, but the holdings of the United States Supreme Court will show differently.

In a very recent case, Bowling v. United States, 34 S. Ct. 659, the Supreme Court of the United States held:

"The guardianship of the federal government over an In-
237 dian does not cease, when allotment is made, and the allottee becomes a citizen."

And the Supreme Court of Washington, in the case of Felix v. Yaksum, 137 Pac. 1037, held:

"Indians are recognized as wards of the nation, and it is the duty of the Court to uphold these restrictions against the alienation of their lands which the federal government has established to prevent them from impoverishing themselves."

As was said by Mr. Justice Day in the case of Marchie Tiger v. Western Investment Company, 221 U. S. 286, 31 S. S. Ct. 578:

"Congress has had, at all times, and now has, the right to pass legislation in the interests of the Indians as a dependent people; that there is nothing in citizenship incompatible with the guardianship over the Indian's lands inherited from allottees as shown in this case; that in the present case, when the act of 1906 was passed, the Congress had not released its control over the alienation of lands of full blood Indians of the Creek nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands, such as are involved in this case;
238 that it rests with Congress to determine when its guardianship shall cease; and while it still continues it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian."

Counsel for respondent, at the top of page 60 of his brief has cited several cases to support his theory that when Weazel was given his allotment, he was thereby made a citizen of the United States, and of South Dakota as well, and his estate was therefore subject to administration by the County Court of Buffalo County. This result does not necessarily follow, as the United States government can still assume the guardianship over the Indians, and treat them as the wards of the nation, even though they are citizens. That was distinctly held in the case of Bowling v. United States, supra.

Also the case of United States v. Sandoval, 34 Sup. Ct. 1; 231 U. S. 28 reversing judgment (D. C.) 198 Fed. 539, in which case the Supreme Court of the United States held:

"Citizenship is not an obstacle to the exercise by Congress of its power to enact laws for the protection of tribal Indians as a dependent people."

In the case of United States v. Allen, (U. S. C. C. A. Okla.)
239 179 F. 13, (reversing decree C. C. 1909, 171 F. 907) the Court held:

"The grant of citizenship to Indians in the Indian Territory by Act Feb. 8, 1887, c. 119, 24 St. 388, as amended by Act Mar. 3, 1901,

c. 868, 31 St. 1447, was intended for their protection, and was not a renunciation by the United States of the authority which it had always exercised to adopt such measures as in its judgment were wise for the protection of the Indian in his rights.

"It is within the power of Congress to enlarge the period within which the Indian allottee is prohibited from alienating his land beyond that imposed when the allotment was made, so long as the land is held by the allottee, although in the meantime he may have been made a citizen."

The United States District Court for Wisconsin, in the case of United States v. Gardner, 189 F. 690, held:

"Though an Indian has become a full-fledged citizen of the United States, and resides on land patented to a prior grantor in fee simple, absolute, yet so long as he remains within the limits of an Indian reservation he is subject to the control of the federal government."

The records in this case will show that the Indian Hin-
240 Tun-Ka-Sau, or Weasel, was still a tribal Indian, and residing on the Crow Creek Sioux Indian reservation.

We have carefully examined the case of Lomax v. Pickering, 173 U. S. 26, cited by respondent on page 62 of this brief, and fail to see how the case is in point at all. The facts of the case all arose prior to the enactment of any of the Congressional legislation involved in the case at bar, and none of the questions considered by the court and decided are applicable to this case. The same argument will apply to the case of Lykins v. McGrath, 184 U. S. 169, cited by respondent on the same page of his brief, the case last cited being of the same general nature as the case of Lomax v. Pickering, supra, and which was based on said case of Lomax v. Pickering as a precedent.

We have carefully examined the case of Blauw v. Love, 9 Kans. App. 55, 57 Pac. 258, and fail to see where that case is in point at all. The Indian title involved was land allotted to Shawnee Indian under the treaty of May 10, 1854, under which a patent was issued to him in 1859. The land was later conveyed by the Indian, and passed through a number of persons before the action was begun to recover a portion of the land in 1899. No principle in-
volved in the case at bar was involved in that action,
241 and we fail to see where it has any bearing on the instant case. We have also examined the case of Stout v. Simpson, 35 Okla. 129, 124 Pac. 754, and agree with counsel for defendant that the only question involved in that case is the construction of Section 9, of the Act of Congress of May 27, 1908, 35 St. L. 315, but fail to see where that section of statute construed had any bearing on the case at bar, as it was made to apply to a particular band or tribe of Indians, and no principle involved in that case could possibly have any bearing here. In the case of Mullen v. Short, 38 Okla. 33, 133 Pac. 230, the same statute was construed as in the case of Stout v. Simpson, supra. While that case held that the County Court of the County wherein the Indian land in controversy was situated, had power to approve the sale of land, they were given the jurisdiction by an express enactment of Congress. That Act applied to Indians of the Five Civilized Tribes, and was not a general

statute. In those cases the statutes enacted were not enacted until the year 1908.

Counsel for respondent have quoted extensively from, and seem to lay special stress upon the cases of United States v. Park Land Company, 188 Fed. 383, and United States Fidelity and
242 Guaranty Company vs. Hanson, 36 Okla. 459, 129 Pac. 60 as sustaining their proposition that the sale by the heirs of Hin-Tun-Ka-Saw, or Weazel, passed a good title to the purchasers. We have carefully examined these cases, and the statute cited therein, but do not believe, in the light of more recent cases decided by the United States Supreme Court that these cases are in point. The case of United States Fidelity & Guaranty Co. v. Hansen is the decision of the Supreme Court of Oklahoma. The Supreme Court of the United States, 34 Sup. Ct. 659, in the case of Bowling v. United States, decided in the year 1914, held:

"The guardianship of the federal government over an Indian does not cease when an allotment is made and the allottee becomes a citizen.

"A conveyance by heirs of Indian allottees, forbidden by Act March 2, 1889, could not be saved by a judgment sustaining the validity of a contract of sale in a suit by such heirs against the purchaser.

"Land, whether in the hands of an Indian allottee or his heirs, is bound by the restrictions in Act March 2, 1889, forbidding alienation for 25 years from the issuance of the patent."

We wish to call the Court's particular attention to the above
243 cited case, and respectfully ask that it be carefully examined.

Counsel for defendant at page 91, folio 269, of his said brief that the suit brought by defendant in the Circuit Court in and for Buffalo County and which was conducted to judgment, was not necessary to perfect the title, but in order to satisfy the objections which had been made by plaintiff. This statement of counsel for defendants is not borne out by the record. The record which appears at page 25 of abstract, folio 72, shows that the Notice of Lis Pendens was not filed and this action commenced until July 31st, 1912. Plaintiff, previous to that time, to-wit: on March 12th, 1912, had advised defendant that his title was not merchantable, and could not be made so. (Exhibit "D," page 15 of abstract.) If plaintiff had advised them that this title could not be perfected, why should they try to do so by an action to quiet title. It only goes to show that they did not consider the title good, but were trying to do anything they could to bolster up a doubtful or valueless title.

Counsel for defendant at page 97 of his brief has set out the letter of the Judge of said Court which was written at the time the motion for a new trial was granted. The record in this case will
244 show that the first trial of said action was had in the month of December, 1912, and at the conclusion of all of the evidence, the Court directed a verdict in favor of plaintiff and against defendant, but that only three or four months later he reversed his action and decided in favor of defendant. At the outset of the case, at least, the trial Court was impressed with the justice of plaintiff's claim.

In conclusion, we merely wish to state that in our opinion which is backed up by the authorities set forth in appellant's opening argument, defendant's title to the premises in controversy was not good, and could not be made good. Appellant bought the land in good faith upon the representation of respondent that the title was good. At the time he was ready to close the deal, he discovered for the first time that title was not good. He then called upon defendant to make the title good, but after having the matter looked into, discovered that it could not be made good, and so advised defendant on March 12th, 1912. He then demanded his money back, which was refused, although defendant and respondent had no reasonable excuse for holding it.

We respectfully ask this Honorable Court to reverse the action of the trial Court, and hold that plaintiff and appellant is entitled to the return of his money on account of failure of respondent's title.

Respectfully submitted,

GEORGE W. EGAN,
Sioux Falls, S. D., Attorney Pro Sese.

And afterwards, to-wit, on the 19th day of February, 1915, said cause and appeal was placed on the calendar of the Supreme Court of the State of South Dakota, and date set for oral argument thereof.

And that thereafter, upon a stipulation in writing entered and filed herein, an order of this Court was issued continuing the hearing of said case until the April 1915 term of this Court and the cause stricken from the calendar.

And afterwards, to-wit, on the 26th day of March, 1915, with the permission of the Court, the said plaintiff and appellant filed his additional reply brief, with due proof of service upon counsel for respondent endorsed thereon, and that the following is a true and correct copy of said additional reply brief as the same appears of record and on file in my office, to-wit:

247 In the Supreme Court of the State of South Dakota, April Term, A. D. 1915.

3643.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Appeal from the Circuit Court of Minnehaha County.

Hon. Joseph W. Jones, Presiding Judge.

Appellant's Additional Reply Brief and Argument.

George W. Egan, Attorney pro sese.
Bailey & Voorhees, Attorneys for Defendant and Respondent.

[Stamped on cover:] Supreme Court, State of South Dakota. Filed Mar. 26, 1915. E. F. Swartz, Clerk.

248 In the Supreme Court of the State of South Dakota, April Term, A. D. 1915.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Appellant's Additional Reply Brief and Argument.

This additional Reply Brief and Argument was prepared and submitted to counsel for respondent and the following stipulation agreed upon between the parties hereto. Under and by virtue of the following stipulation, it is desired by appellant to have this additional Reply Brief and Argument filed and considered by the court when this case shall be reached for disposition.

249 *Stipulation.*

(Omitting Title.)

The appellant herein, after further study and consideration, desires to present further authorities and additional argument to this court in the following particulars:

(*a*) Appellant desires to present more directly to the Court the issues that a Federal question is involved in this case.

(*b*) He desires to present further argument and authorities showing, as he claims, the insufficiency of the abstract tendered by respondent.

(c) He desires to call the court's attention, by further argument and citation of authorities, to the question of the insufficiency of title tendered by reason of the defective evidence of heirship.

(d) He desires to present further argument and citations in addition to that which he has already filed herein supporting his contention, to prevail in this case.

Now therefore It is stipulated by and between the parties hereto, that, with the permission of this court, this Additional Reply Brief and Argument may be filed and considered by the court in disposing of the questions involved in this case; it being agreed and understood that the respondent may, if he desires, file written answer or citations of authorities to any new authorities or points which he
250 may deem are raised by this Additional Reply Brief and Argument.

GEORGE W. EGAN,
Attorney pro sese.
BAILEY & VOORHEES,
Attorneys for Defendant and Respondent.

Additional Reply Brief and Argument.

I.

There is a Federal question involved in this case, and that there may be a review of it by either party, it is necessary that the attention of the court should be called to it; which, perhaps, has not been done with that fullness and directness that would furnish a right of review.

It is provided by the Federal Judiciary Act, U. S. Compt. St. 1901, p. 575, that the supreme court of the United States has jurisdiction to review a decision of the court of last resort of a state, which involves the validity or effect of a statute of the United States.

In our main brief and argument we contended that under the Federal statutes and decisions, the land involved in this case was held in trust by the government because the limitation had not expired; that the trust patentee, Weazel, could not have con-
251 veyed a good title, and that being so, his heirs could not, particularly in view of the fact that that class of persons was and is mere wards of the government, and have only such power to sell or dispose of property given them as is expressly conferred by Congress.

This contention is denied by respondent; it is contended by him that under the statute of 1902, 32 St. L. 275, "the sale by the heirs passed a good title," Brief, pp. 47, 50.

This latter contention we deny.

Now, the contention of either side clearly presents and involves the construction and effect of statutes of the United States, with reference to persons and property that we contend are within the exclusive care and control of the government. A Federal question is, therefore, involved. 11 Cyc. 928.

II.

For the reasons briefly set forth and enumerated in the foregoing stipulation, and for the further reasons that there are questions of law and controlling decisions which have come to our attention in a further study of the questions to be presented in this court not referred to in our Brief and Argument heretofore presented; and also in view of the fact that the question to be decided by the court in this case has never been considered by the supreme court of our
252 state; and the issues involved are of great public importance to our people we desire to have considered with such care as the court may deem proper, the following pages of this Additional Reply Brief and Argument.

But in presenting this Additional Reply Brief and Argument, and the authorities and points presented herein, we desire it distinctly understood that we do not recede from any contention made, or position taken by us in the presentation of the questions involved in this case.

a.

Counsel for respondent give our trust and ward theories no serious consideration, but make the independent contention that under the May 27th, 1902, Act of Congress, the heirs, alone, of the trust patentee, could, with the approval of the Secretary of the Interior, convey a good title.

Assuming this to be true, and, leaving out of consideration, for the present, the county and circuit court judgments, which under respondent's assumption and contention, he would be disposed to do, would respondent's contract, to furnish an "abstract showing good merchantable title," F. 73, be complied with if it did not disclose facts showing Weazle's death, and that Mr. Huston's grantors were all the patentee's heirs? Respondent's counsel would say yes to this question; and we would answer no!

253 We desire briefly to establish the negative of this proposition and then refer to Federal authority, showing that finding or adjudicating Indian heirship of allotted land, is exclusively a question of Federal authority and control.

If these two positions are established, it will necessarily work a reversal of the judgment.

b.

Even where there is no such strong express obligation, as to the character of the title to be furnished, it is important to be mindful that the law of this state implies that the title must be "free from reasonable doubt," C. C. Sec. 2347, Black H. N. B. v. Kellogg, 4 S. D. 312; Godfrey v. Bram, 27 id. 218, 130 N. W. 442.

An abstract of title "is a statement in substance of what appears in public records affecting the title of property agreed to be conveyed, and also a statement in substance of such facts as do not appear upon the public records which are necessary to a perfect title." Wright v. Bott, 163 S. W. 360, and authorities cited. To the same effect, see also, Heinsen v. Lamb, (Ill.) 7 N. E. 77.

An abstract, showing good title, necessarily means title deducible from record, not parol or illegal evidence, even if it were possible for him to show title by witnesses.

The very first entry in this abstract furnished, discloses a
254 "trust patent," App. Ab. p. 39. Being held to know the law, the purchaser would have notice that the government even had not parted with any title.

Now, as above suggested, eliminating the county and circuit court judgments, and passing to the May, 1902, Act, respondent's Brief, p. 47, what is there in this abstract to show that Mr. Huston's grantors are all of the "adult heirs" of the trust patentee, or even that the patentee is dead, or if he were, that even these grantors are in fact his heirs? One's mere self-serving declaration that he or they are the "sole and only heirs," is no evidence thereof, and his Secretary had no authority to pass on heirship till the June 25th, 1910, Act, respondent's Brief, p. 49. Under the 1902 Act, the Secretary is only given power to approve the deed. Counsel say the 1910 Act "in no way affects the case at bar," p. 50.

Now, it is a well settled rule under such contract as is here involved, that if the abstract furnished does not show a contractual transfer between a prior grantee and a subsequent claimant of the title, that is, a deed from one to the other, and it also fails to show that which would constitute a good transfer of title by the law of the locality where the land is situated, the purchaser may refuse the title, for he will not be put to the hazard of a decision of a question
255 of fact outside of legal record evidence, with an abstract of which, the contract was, he should be furnished before he took the property. Such abstract was a condition precedent to the purchase. Bras. v. Farrington, (Cal.) 24 Pac. 787; Taylor v. William, (Col.) 31 id. 504; Brown v. Widen, (Ia.) 103 N. W. 158. This rule as to a contractual break in the chain of title has numerous illustrations where there has in fact been a descent cast, and there has been no adjudication of death, heirship and finding of persons who are heirs or devisees.

In support of the general rule to which we have referred, see:
Turner v. McDonald, (Cal.) 18 Pac. 262; 9 Am. St. 189.
Gates v. McWilliams, (Ky.) 6 Dana. 42.
Rozier v. Wright, (Mo.) 48 S. W. 470.
Austin v. Shipman, 141 id. 425.
Cerf. v. Diener, (N. Y.) 104, N. E. 126.
Wanser v. De Nise, (N. Y.) 80 id. 1088; 117 Am. St. 871.
Foster v. Eoff, (Tex.) 47 S. W. 394.
Coonrad v. Studebaker, (Wash.) 101 Pac. 489.
Watson v. Boyle, 104 id. 147.
Colper v. Ludblow, 106 id. 634.
Crosby v. Wynkoop, id. 175.

256 This last was an Indian title case, where the seller agreed to convey, "good title free from all incumbrances as shown by a complete abstract of title." It appeared "the land was originally patented to John Mecker, as the head of a family, consisting of him-

self, his wife, Elizabeth, and daughter, Margaret, pursuant to" a treaty with the Puyaullups Indians.

Here "the appellants," the vendors, the court said, claimed "title under a deed from John Meeker and certain persons claiming to be heirs of Elizabeth Meeker, his wife, who died many years ago. There was no administration upon the estate of Elizabeth Meeker and nothing upon record to show that the appellant's grantors were the heirs at law or all the heirs at law of Elizabeth Meeker, deceased, except an ex parte affidavit filed for record in the office of the county auditor entitled 'Jerry Meeker to the Public.' Under this state of facts the appellants may have had a good title in fact, but they did not have such a title as they agreed to convey, namely, a good title shown by abstract, and the respondent was not bound to accept it."

In the first,—the California case above cited—the vendor sought to enforce the contract where there was a descent but the will which had been proven in Michigan, had not been probated in California where the land was, and the court said:

257 "When one dies leaving property in this state, that property must be disposed of according to the laws of this state. And if he left a will, that will must be proved here before it can affect property situated here. Now, can it be said, beyond doubt, that Mrs. Tripler could convey by quit-claim deed, a good title to the lot in question before the will, under which she claimed it, was produced and proved here? It seems to us that these questions must be answered in the negative, and that it must follow, therefore, that defendant's title was not fairly 'deducible of record.' "

The law even implies an obligation to furnish a title deducible of record. This rule has been applied to judicial sales where the descent has been cast some seventy years, and the proof outside the record pretty clearly showed that the persons claiming to be heirs, and those holding under them, had been in possession all that time. Still, as the title depended on the uncertainty of the decision of a question of fact, apart from legal record evidence, the court held such title was not free from reasonable doubt. The head note of the case is as follows:

"Where property is sold at a judicial sale, and on motion to compel the purchaser to comply with his bid it appears that, more than seventy years before, one F. O. was the owner of the property, and that, about forty years prior to the sale, a conveyance was

258 procured from thirty-nine persons, who were then assumed to be his heirs, but there is no direct evidence of his death nor the heirship of such persons, and no sufficient evidence of adverse possession, the purchaser cannot be compelled to comply with his purchase." 117 Am. St. 872, Supra.

Under substantially such a contract as is here involved the Texas court held: "The heirship of these parties under whom the plaintiffs claim, who pretend to be the heirs of the original grantee, was a fact necessary to be established before the defendants should be required to accept the title offered by the plaintiff, Mrs. Foster. There is no presumption of law that they were heirs, nor does the recital of that fact in their deed establish their heirship; and the defendants would

not be required to accept the title of parties claiming to be the heirs, upon the mere assertion of those parties that such was the fact. Heirship from the original grantee in this case was a link in the plaintiff's title, and, if it was missing, or, in other words, not established, it would be as complete a hiatus in the chain of title as would be the want of a deed conveying the interest of some one connected with the sovereignty of the soil."

The Kentucky court, according to a reliable note of the case, held:

"A decree for a title against persons described as heirs is not
259 sufficient in a chain of title, without proof aliunde, that they are the heirs and only heirs of the person last seized."

In view of the necessity of deducing title to land by record, under such contract as is here involved, and this not having been done without considering the county and circuit court judgments, even if they were sufficient in form, it becomes important to consider their force and effect.

c.

Our position respecting the title, eliminating those documents, would seem to stand confessed, for their only purpose was to fully supply, if possible, the link between the patentee and Huston.

We contend that the determination of Indian heirship of allotted lands was and is a matter within Federal authority exclusively, and that the state adjudications referred to were without any validity or force whatever. That land belonged to the United States, and it parted with it only to the extent, prescribed by the Acts of Congress. Through the President it first declared itself a Trustee for the patentee, and giving the 1902 Act all the force and effect claimed for it by the other side, the government, by the Secretary's approval of the Huston deed, parted with its right to the extent of the interest of those three so-called heirs, assuming the patentee was dead, and that those grantors were in fact, heirs. If they were not, the
260 government still holds the land; if they were, it still holds an interest except that of the three, and it is nowhere shown by the abstract furnished, without considering the judgments, that the government in truth has parted with anything more than the right of possession to the trust patentee.

Under Act of Congress, 1894, 28 St. L. 286, covering this period, 1894 to 1910, all questions of heirship, or right of possession to these lands was within the exclusive jurisdiction of the circuit courts of the United States. This is very clear from the broad language of that 1894 Act, and it has been so held by the supreme court in the case of McKay v. Kalyton, 204 U. S. 458; 51 L. Ed. 566; 27 S. C. Rep. 343.

This case originated in the state circuit court of Oregon, where a daughter of the allottee, "as his sole heir," sought to have "her status as legal heir of the deceased adjudged by a court of competent jurisdiction," and to obtain possession of the allotment, and the trial court held her "to be an illegitimate child of the deceased, and to have no right, title or interest in or to the land in question," and dismissed her action. On appeal to the supreme court of the state, the judgment was reversed, 74 Pac. 491. Upon re-hearing it was contended

that the state court was without jurisdiction, and that there
261 was a Federal question involved. This the state court decided, and overruled the application for a re-hearing: 78 Pac. 332. It was then taken to the Supreme Court of the United States and there reversed on the ground that jurisdiction of all of these questions respecting allotments was then in the Federal circuit courts.

Then Justice, now Chief Justice, White, after referring to prior legislation and decisions of the court, said:

"It results, therefore, that the Act of Congress of 1894, which delegated to the courts of the United States the power to determine such questions, cannot be construed as having conferred upon the state courts the authority to pass upon Federal questions over which, prior to the Act of 1894, no court had any authority. The purpose of the Act of 1894, to continue the exclusive Federal control over the subject is manifested by the provision of that Act which commands that a judgment or decree rendered in any such controversy shall be certified by the court to the Secretary of the Interior. By this provision, as pointed out in the Smith case, supra, the United States consented to submit its interest in the trust estate and future control of its conduct concerning the same to the result of the decree of the courts of the United States,—a power which such courts could alone exercise by virtue of the consent given by the Act. The sub-
262 sequent legislation of Congress, instead of exhibiting a departure from this policy, confirms it."

In further illustration of this exclusive jurisdiction in the Federal courts, we call attention to an heirship adjudication by Judge Bellinger of the Federal court of Oregon, in the case of Parr v. Colfax, 132 Fed. 1004, which was a "suit by Indians to recover an interest in allotted lands," and the question of the jurisdiction of the Federal and State courts, arose "on demurrer to the bill." After referring to this 1894 Act, as amended February 6, 1901, he concluded as follows: "There can be no proceeding of the character in question other than that provided by the Acts of Congress referred to. The jurisdiction conferred by those Acts is exclusive in courts of the United States. The demurrer is overruled."

The defendants then answered and among other defenses was that of an adjudication of the issue by the state court, which was pleaded as an estoppel, so the question of the jurisdiction of the state courts to pass upon the question involved was presented from another angle, and this time Federal Judge Wolverton, former Chief Justice of Oregon, referring to the issue, said: that "has been decided by the supreme court of the United States, and it was there considered that the state court is without jurisdiction to determine heirship,
263 under Act March 5, 1885, Chap. 319, 23 St. 34, under which the allotments were made to the Indians upon the Umatilla reservation. The court held that, prior to the Act of Congress of 1894, all controversies necessarily involving the determination of the title, and incidentally the right of possession, of Indian allotments, while they were held in trust by the United States, were not primarily cognizable by any court, either State or Federal, and that the result of the Act of Congress which delegated to the courts of the

United States the power to determine such questions cannot be construed as having conferred upon the state courts the authority to pass upon Federal questions over which, prior to the Act of 1894, no court had any authority. Hence it was determined, as previously indicated, that the state courts had no authority in that case to adjudicate touching the heirship as it respects Indian allotments. The case is preclusive, therefore, of any further controversies on the question in this case, and it is plain that the plea cannot operate as an estoppel to the present suit." It is to be remembered that this was a collateral attack on the judgment, and, if it had not been void it could not have been assailed in this way.

There was an appeal taken, but it was dismissed, Parr v. Colfax, 117 C. C. A. 48, for want of jurisdiction, because a few days
264 after the decree below was rendered, Congress by the Act of June, 1910, 36 St. L. 855, repealed the statute conferring jurisdiction on the Federal courts to determine heirship in these allotment matters, and vested the authority with the Department of the Interior.

While these cases involved land on a particular reservation they decided beyond question, it seems to us, where the power was lodged to determine the only question here involved, that of heirship in such cases, and, in view of the statute and its construction, this court must, as the Federal courts have, hold that these judgments of the State, county and circuit court, brought upon that record and abstracted, present nothing that is entitled to any legal consideration and respect whatever.

There is another ground of Federal jurisdiction. As it is not shown by any evidence that can be recognized, or that has any legal validity, that the trust patentee is dead, or, if he is, that these three are all his heirs. Whatever interest there may be out is still in the United States, and it would be a necessary party, and a state court would have no jurisdiction over the general Government.

It is too well settled to need more than merely to remind the court of the rule, that it will, of course, follow the construction that the Federal court has placed upon statutes of the United States,
265 as that court would follow this court's construction of the statutes of this State.

From the letter of the trial Judge, respondent's Brief, p. 98, his decision appears to have been based on the "decree of the county court of Buffalo county," and 188 Fed. 383, and 129 Pac. 60.

The Federal case referred to does not disclose what the facts were, merely construed some special legislation for Minnesota, and was the mere oral expressions of a trial judge to counsel on a motion. It seems to have been an action by the government against timber land trespassers.

The other case was rightly decided because the territorial probate court was there "the proper court," within, as the court properly says, "the plain language of the statute" of 1902, to appoint a guardian of a minor.

One, if he is not on his guard, is liable to be misled by some of those declarations in regard to allotted Indians being citizens. Many

of the state and district and circuit courts of the United States were, but with the reversals in the Columbia George case, U. S. v. Clestine, 215 U. S. 278; 54 L. Ed. 200; 30 Sup. Ct. Rep. 1167, they were set right.

The state courts seem to have been singularly unfortunate with these questions: On the subject of rights with reference to allotments we have found only two cases that have gone to the supreme court of the United States, and the supreme courts of the States
266 were reversed in both. Oregon, in the McKay case to which we have referred, and Oklahoma, in the case of Tiger v. Western F. Co., 221 U. S. 286; 55 L. Ed. 736; 31 S. C. Rep. 578.

In view of the foregoing we contend that under the laws of the United States, appellant was entitled to have the abstract furnished to him by respondent, show a Federal decree of heirship, or evidence from Federal authority, not a mere "decree of the county court of Buffalo county," as held by the trial Judge; and that if this court holds our contention to be correct, which we think it most certainly ought to do, then error will lie to the supreme court, because it brings in question, the construction of statutes of the United States, and denies its right and authority for it was interested and was a necessary party during that period, to a full adjudication of heirship of the land here involved.

Respectfully submitted,

GEO. W. EGAN,
Attorney Pro Sese.

267 That on the same date, to-wit, March 26, 1915, with the permission of the Court, said defendant and respondent filed his additional brief, with due proof of service upon the plaintiff and appellant endorsed thereon, and that the following is a true and correct copy of said respondent's additional brief, as the same appears of record and on file in my office, to-wit:

268 In the Supreme Court of the State of South Dakota, April Term, 1915.

3643.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Appeal from the Circuit Court of the County of Minnehaha.

Hon. Joseph W. Jones, Presiding Judge.

Additional Brief for Defendant and Respondent.

Bailey & Voorhees, Attorneys for Defendant and Respondent.

[Stamped on cover:] Supreme Court, State of South Dakota. Filed Mar. 26, 1915. E. F. Swartz, Clerk.

269 In the Supreme Court of the State of South Dakota, April Term, 1915.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Appeal from the Circuit Court of the County of Minnehaha.

Hon. Joseph W. Jones, Presiding Judge.

Additional Brief for Defendant and Respondent.

The respondent avails himself of the privilege accorded by the recent order of the court permitting the appellant to file an additional reply brief and argument herein and presents to the court this additional brief chiefly for the purpose of discussing some of the
270 authorities cited by the appellant in his reply brief and in his said additional reply brief and argument and to answer the new suggestions made by the appellant in those briefs, particularly in the additional reply brief.

We have no contention with the cases cited by the appellant in his reply brief to the effect that the guardianship of the Federal Government over an Indian does not necessarily cease when an allotment is made and the allottee becomes a citizen of the United States, and that citizenship acquired by an Indian is not an obstacle to the exercise by congress of its power to enact laws for the protection of the tribal Indians as a dependent people, and that an Indian though he may have become a citizen and reside on allotted land, an absolute

patent in fee simple to which has been issued to him, may be subject in some respects to the control of the Federal Government. The correct statement of the law on this point, as we understand it, is found in the case of Tiger vs. Western Investment Company, 221 U. S. 286, a case cited by appellant and relied on by him. At folio 11 of his reply brief the appellant quotes from that opinion at page 316. It clearly appears from that quotation that is within the power of congress to continue to restrict alienation of allotted lands
271 and also that it rests with congress to determine when its guardianship shall cease and while its guardianship continues it has the right to vary its restrictions upon alienation of allotted lands. Congress exercised this right so far as the case at bar is concerned when it enacted the statute particularly involved in this case 32 St. L. 275 (quoted at folio 137 of the brief for respondent) by which it provided that land which had been allotted, as had the land involved in the case at bar, could be sold and conveyed by the heirs of the deceased allottee, provided the conveyance should be subject to the approval of the Secretary of the Interior, and that the conveyance so approved should convey a full title to the purchaser.

We note in this connection that section 22 of the Act of April 26, 1906 (34 St. L. 137) copied at pages 303 and 304 of the opinion in the Tiger Case is in effect the same as section 7 of the statute, 32 St. L. 275, involved in the case at bar and in its opinion in the Tiger Case, at page 307, the Supreme Court of the United States in discussing said section 22 clearly recognizes that under said section 22 the heirs of the deceased Indian allottee have the power to convey allotted land to which they have succeeded by inheritance the
272 conveyance being approved by the Secretary of the Interior, just as we contend that such heirs have the power so to do under section 7 of the statute involved in the case at bar.

The appellant cites and evidently strongly relies upon the case of Bowling vs. United States, 223 U. S. 528. We have no contention with this case. As will appear from it the court recognizes the fact that congress has enacted legislation for the sale of allotted lands by heirs of allottees upon the approval of the Secretary of the Interior, in fact the court cites said section 7, (32 St. L. 275). The case is to be distinguished, however, from the case at bar because in it, the Bowling Case, the sale made by the heirs of the deceased allot-ee had not been approved by the Secretary of the Interior. In fact the Bowling Case sustains the position for which the respondent contends.

At folios 14 to 33, inclusive, of his additional reply brief, appellant discusses the character and sufficiency of the showing made by the abstract of title which was furnished to him by the respondent. We have, we think, adequately discussed this question at folios 107 to 118, inclusive, and at folios 274 to 286, inclusive, of the brief for the respondent. We suggest also that the respondent did not by his abstract present to the appellant a "self serving declaration"
273 regarding heirship of the character referred to by appellant at folio 19 of his additional reply brief but presented an abstract showing a copy of a decree of final distribution, which, of course, was of itself a sufficient showing of the death of the deceased and was an adjudication of the heirship of the grantors in the so-called Indian deed shown by the abstract. It will be found on inves-

tigation that the cases cited by appellant on this point at folio 23 of his additional reply brief are cases in which there had not been such an adjudication of heirship. This clearly appears from the case of Crosby vs. Wynkoop, 106 Pac. 634, which appellant discusses and quotes at folios 24 to 26, inclusive of his additional reply brief, and such lack of an adjudication of heirship was a factor in the other cases quoted from and discussed by the appellant at folios 27 to 32, inclusive of his additional reply brief.

The chief contention made by the appellant in his additional reply brief, as we understand it, is, that the determination of Indian heirship of allotted lands is a matter within Federal authority exclusively, and that, therefore, adjudications of such heirship by state courts are without any validity or force. To sustain this contention appellant cites the cases of McKay vs. Kalyton, 204 U. S. 458,
274 and Parr vs. United States, (erroneously called by appellant as Parr vs. Colfax), 132 Fed. 1004, 153 Fed. 462.

The McKay-Kalyton Case is considered at length at folios 239 to 252, inclusive, of the brief for the respondent, from which it will appear that it is not an authority to sustain the position contended for by the appellant in the case at bar. The statutes enacted by Congress referred to by appellant in his additional reply brief enacted in 1894, 28 St. L. 286 and the amending act of 1901, 31 St. L. 760, as is clearly apparent from reading them, relate to the jurisdiction conferred upon the courts of the United States to determine controversies to allotted lands to which controversies a person who is in whole or in part of Indian blood or descent is a party. No such controversy exists or ever existed with respect to the land involved in the case at bar. No claim has ever been made that there was an heir of the deceased allottee Weasel besides the three heirs described in the final decree of distribution made in the matter of his estate by the County Court of Buffalo County, and who executed the so-called Indian deed which was approved by the Secretary of the Interior. The possibility that there may be such an heir is not a legal reason for objecting to the title when no affirmative showing is made that such an heir exists.

275 What we have said with regard to the McKay-Kalyton Case applies as well to the case of Parr vs. Colfax.

That the federal courts have recognized the fact that under the provisions of said Section 7 of the act involved in this case, 32 St. L. 275, lands inherited from Indian allottees may be conveyed by the heirs in fee subject to the approval of the Secretary of Interior will clearly appear from a careful reading of the following cases among others, United States vs. Thurston, 143 Fed. 287, National Bank of Commerce vs. Anderson, 147 Fed. 87, United States vs. Leslie, 167 Fed. 670, (a case arising in South Dakota, the decision in which was by Judge John E. Carland), United States vs. Bellm, 182 Fed. 161 and United States vs. Comet Oil & Gas Co., 187 Fed. 674.

The appellant seems to think that the case at bar is one to determine and quiet the title to the land in question. Such of course is not the character of the case. The respondent resists the claim made by the appellant for the recovery of that portion of the purchase price of the land which was paid by the appellant when the contract for the purchase of the land was made and resists the claim on the ground

among others that the abstract of title to the land furnished
276 by him to the appellant showed a merchantable title. The appellant objected to the character of the title on certain specified grounds and it is too late for him to urge any other grounds, and we are of the opinion that the respondent in his first brief and in this present brief as well, has shown that the objections so stated by the appellant and for that matter all other objections which since that time have been urged by him are without merit.

Respectfully submitted,

BAILEY & VOORHEES,
Attorneys for Defendant and Respondent.

277 And I further certify that appellant's statement of the record as amended by respondent's brief, by appellant's reply brief, by appellant's additional reply brief, and by respondent's additional brief, constituted the entire record of said action on appeal for the consideration of the Supreme Court of the State of South Dakota upon the determination of said appeal, and that the original record of the trial court was not before the said Supreme Court upon the appeal thereto.

And afterwards, to-wit, on the 27th day of March, 1915, said cause and appeal was again placed on the calendar of this Court, and thereafter, to-wit, on the 13th day of April, 1915, said cause was called for oral argument on the merits of the case and argued by counsel and submitted to the Court upon such oral argument and the written briefs heretofore mentioned and filed herein. And that afterwards, to-wit, on the 7th day of August, 1915, the judgment and decree of the lower court was affirmed by the Supreme Court of the State of South Dakota, and an opinion of the Supreme Court therein filed and entered, which said decision and opinion is in words and figures as follows, to-wit:

278 #3513-A-"P"

In the Supreme Court of the State of South Dakota.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Appeal from the Circuit Court of Minnehaha County, Hon Joseph W. Jones, Presiding Judge.

Opinion filed Aug. 7, 1915.

279 George W. Egan, Attorney for Plaintiff and Appellant.

Bailey & Voorhees, Attorneys for Defendant and Respondent.

POLLEY, *J.*:

The questions to be decided on this appeal, as stated by appellant in his brief, are: First, did respondent have, and did his abstract show, merchantable title on the first day of March, 1912, to the land described in the complaint? And, second, was respondent in a position to, and did he, by warranty deed, convey merchantable title to said premises? A determination of the first question will dispose of the second.

The land—title to which is the subject of this controversy—is a 320 acre, Indian allotment, situated in Buffalo County. The instrument evidencing the allottee's title is designated as a "Trust Patent." It was issued in December, 1895, and the portion thereof that is material to this case is as follows:

" * * * Now, know ye, that the United States of America, in consideration of the premises and in accordance with the provisions of the eleventh section of said Act of Congress of the 2nd March, 1889, hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said eleventh section) for the period of twenty-five years in trust, for the sole use and benefit of the said Hin-Tun-Ka-Sau, or Weazel, or in case of his decease, for the sole use of his heirs according to the laws of the state or territory where such land is located, and that, after the expiration of said period, the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; provided that the President of the
280 United States may, in his discretion, extend the said period by a term not exceeding ten years; and if any lease or conveyance shall be made of said lands, or any contract made touching the same before the expiration of the time above mentioned,

such lease or conveyanc or contract shall be absolutely null and void."

Some time after the issuance of this patent, the allottee died, and respondent claims title through a deed purporting to have been executed by the allottee's heirs. It will be noted that this patent does not vest, nor purport to vest, in the allottee the fee to the land. It gave to him the right to the possession and use thereof, but he could not lease it to another nor could he convey or incumber the title. This being the situation at the time of the allottee's death, it is contended by appellant that the allottee's heirs acquired no greater right in the premises than was possessed by their ancestor, and that, therefore, they conveyed no title by their deed to the respondent; that the fee to the land must remain in the government until it is conveyed by subsequent grant; and that the restriction upon the alienation of the land found in the patent must continue for at least twenty-five years. Appellant devotes a large portion of his argument to this proposition, and, in support thereof, cites the following cases: Jackson v. Thompson, 80 Pac. 454 (Wash); Bowling V. United States, 191 Fed. 19; Goodrum v. Buffalo, 162 Fed. 817. These cases, however, are not in point. They merely go to the extent of holding that "restrictions upon alienation," such as is contained in the patent here under consideration, are binding, not upon the allottee alone but that such restrictions run with the land and are as binding upon the
281 heirs of the allottee as they are upon the allottee himself.

This, of course, is a correct statement of the law as it existed at the time of the issuance of the patent. But it is claimed by respondent that such legislation was enacted, and such proceedings were had, subsequent to the issuance of said patent, that the heirs of the allottee were clothed with power to alienate the land, and that title thereto passed by their deed. This claim is based upon the provisions of an act of Congress approved May 27, 1902. Section 7 of said Act, found at page 275, 32 Statutes at Large, is as follows:

§7. "That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the state or territory where the same is situate: Provided, that the sale herein provided for shall not apply to the homestead during the life of the father, mother or the minority of any child or children."

The effect of this provision was, in case of the death of the

allottee, to remove the "restriction upon alienation" found in the patent here under consideration. In case of the death of the allottee, his allotment may be sold by his heirs themselves, if adult, and by the guardians of the heirs where they themselves are minors. This is the plain import of the language used, and that the government, acting through Congress, had the same power to
282 remove the restriction upon alienation that it had to place it there in the first instance and could change the manner of transferring title to another cannot be questioned.

At the trial of the cause, there was received in evidence a decree of final distribution of the estate of the allottee entered by the County Court of Buffalo County, in which it is expressly found and decreed that the parties who undertook to convey the allotted land are the sole heirs of the allottee; also a decree of the Circuit Court within and for Buffalo County in an action between Chas. S. McDonald, who is the defendant in this action, and the unknown heirs at law, devisees, legatees, and the executor or administrator of the allottee wherein the said Chas. S. McDonald is decreed to be the owner in fee of the said allotment. It is conceded that the heirs of the allottee are adults, and no question can be raised as to their right to convey the land subject, of course, to the approval of the Secretary of the Interior. It is contended by appellant that these decrees were incompetent for any purpose, because, as contended by appellant, the allottee and his heirs being wards of the Federal government, the Federal court alone had jurisdiction over them and their property, and that neither the County Court of Buffalo County nor the circuit court of that county had jurisdiction to determine who were the heirs at law of the deceased allottee nor to determine the question of title to the allotment. Whether or not the County Court of Buffalo County had jurisdiction to decide the question of heirship, it is not necessary to determine.

The validity of the conveyance from the heirs of the allottee
283 depended upon the confirmation and approval of the Secretary of the Interior. The deed purported to have been executed by all of the heirs of the allottee and was approved by the Secretary of the Interior as a deed from all of such heirs. Whether that office acted upon the decree of final distribution entered by the County Court of Buffalo County or based its conclusion as to heirship upon information derived from some other source, it is not necessary to inquire. The approval of the deed terminated the jurisdiction of the government over the land conveyed by that deed and, from that time, the land was under the exclusive jurisdiction of the state courts: King v. McAndrews, 50 C. C. A. 29, 111 Fed. 860. That the Circuit Court of Buffalo County acquired jurisdiction of the heirs of the allottee is not questioned. Therefore, that court had jurisdiction to determine the title to the land, and its decree declaring defendant to be the owner in fee thereof set the matter of title at rest. From this it follows that respondent was possessed of a merchantable title to the allotment on the first day of March, 1912. That respondent was then, and at all times since then has been, ready and willing to

convey such title to defendant upon the payment of the balance of the purchase money is not questioned. Appellant stated on the argument that he had no desire to rescind the contract of purchase if he could get the kind of title he had contracted for. Therefore, it is not necessary to consider the question of rescission presented by the printed briefs.

The judgment and order appealed from are affirmed.

284 And I further certify that the following is a true and correct copy of the remittitur judgment entered and filed herein as transmitted to the trial court on the 12th day of October, 1915, as shown by the records of my office, to-wit:

285 IN THE SUPREME COURT,
State of South Dakota, ss:

Be it remembered, that at a term of the Supreme Court of the State of South Dakota, begun and held at Pierre, State of South Dakota, on the first Tuesday of April, A. D. 1915, on the 35th day of the term, to-wit: On the 7th day of August, A. D. 1915.

Present: J. H. McCoy, Presiding Judge; Chas. S. Whiting, Ellison G. Smith, John Howard Gates, and Samuel C. Polley, Judges of said Court. The following proceedings were had and the following judgment was entered, to-wit:

286 File No. 3643.

IN THE SUPREME COURT,
State of South Dakota, ss:

April Term, A. D. 1915.

Present: J. H. McCoy, Presiding Judge; Chas. S. Whiting, Ellison G. Smith, John Howard Gates, and Samuel C. Polley, Judges of said Court, and the officers thereof.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. MCDONALD, Defendant and Respondent.

This action coming on to be heard at the April, A. D. 1915 Term of this Court at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case and argued by counsel, and the Court having advised thereon and filed its decision in writing.

It is considered, ordered and adjudged, that the judgment and order of the Circuit Court, within and for Minnehaha County, appealed from herein, be and the same are hereby affirmed.

And it is further ordered, that this action be and it is hereby

remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it is further ordered and adjudged, that respondent have and recover of the appellant costs and disbursements on this appeal, expended, taxed and allowed at One Hundred Twenty-three & 25/100 Dollars.

By the Court,

[SEAL.]

J. H. McCOY,
Presiding Judge.

Attest:

E. F. SWARTZ,
Clerk,

By —— ——,
Deputy Clerk.

287 STATE OF SOUTH DAKOTA,
County of Hughes, ss:

I, E. F. Swartz, Clerk of the Supreme Court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of the judgment of the Supreme Court of the State of South Dakota, in the above entitled action, wherein George W. Egan is Plaintiff and Appellant, versus Charles S. McDonald, Defendant and Respondent, as the same now remains of record in said Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 12th day of October, A. D. 1915.

E. F. SWARTZ,
Clerk,

By S. G. DE LAND,
Deputy Clerk.

Costs and disbursements taxed and allowed as follows:

Before Argument	$5.00
For Argument	$15.00
Clerk's Fees to Perfect Appeal Record	$.....
Printing Brief	$94.25
" additional brief	9.00
Fees Clerk of Supreme Court	$.....
Total	$123.25

Filed Oct. 14, 1915. Minnehaha County, S. D. E. J. Anderson, Clerk Circuit Court.

288 [Endorsed:] (File No. 3643.) In Supreme Court, State of South Dakota, April Term, 1915. George W. Egan, Plaintiff and Appellant, vs. Charles S. McDonald, Defendant and Respondent. Filed in open court this — day of ——, 19—. —— ——, Clerk. Remittitur.

289 And thereafter, and on the 6th day of September, 1915, a petition for rehearing of said appeal by the Supreme Court of the State of South Dakota was filed by the said plaintiff and appellant, which in words and figures is as follows, to-wit:

290 In the Supreme Court of the State of South Dakota.

No. 3643.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES B. McDONALD, Defendant and Respondent.

Opinion Filed August 7, 1915.

Petition for Rehearing.

Appellant petitions this court for a rehearing of this appeal for the reason that the main points upon which he relied for a reversal of the judgment appealed from have apparently been overlooked by this court in its opinion filed with the clerk of said court on August 7th, 1915.

We wish to call the court's attention to the fact that the question involved in the above entitled action is a very important one, and one that has not been passed upon before by this court. For that reason appellant will urgently request a rehearing of this appeal, to the end that the matter may be fully examined and passed upon, the question being one of great interest not only to the public at large, but the legal profession.

Appellant relies for a rehearing on the following grounds:

1. In its decision, the court failed to take into consideration the fact that the Indians are still wards of the government of the United States, and, as such, have not the right to sell, assign, trans-
291 fer or lease the real estate allotted to them under the so-called "General Allotment Act" of February 8th, 1887.

2. The court, in making up its decision, failed to consider the fact that, at the time of the death of the allottee, Hin-Tun-Ka-Sau, or Weasel, to whom the "trust patent" was issued, he had no title to the land, save the possessory title thereto, consequently, after his death, his heirs would have no greater rights than he had.

3. The court failed to consider, in making up its decision the fact that the approval of the secretary of the interior was merely a ministerial act, and not a judicial act.

4. The court, in its decision, overlooked the fact, and failed to take into consideration the fact that the question to be passed upon in deciding this case, presents and involves the constructions and effect of the statutes of the United States, with reference to persons and property that appellant contends are within the exclusive care and control of the United States government.

5. The court failed to consider, in its opinion, that the finding or adjudicating Indian heirship to allotted land is exclusively a question of Federal authority and control. McKay v. Kalyton, 204 U. S., 458; 27 S. C., 343.

6. The court failed to consider, in making up its opinion, that the title which was shown by the abstract tendered by respondent to appellant, under the terms of the contract of purchase, was "not free from reasonable doubt."

7. The court, in its decision did not consider the necessity of a Federal decree of heirship of the heirs of Hin-Tun-Ka-Sau, or Weasel, in order to make a perfect title, or a merchantable title, which appellant was entitled to.

8. The court failed to take into consideration the fact that under the act of May 27th, 1902, so strongly urged by respondent in his brief as authorizing the secretary of the interior to approve deeds issued by heirs of deceased Indians, and conferring on state courts the power to determine such heirship, there is great uncer-
292 tainty of having procured a deed —— polygamy is practiced by the Indians and is recognized by our Federal appellants and supreme courts, and also the uncertainty of the heirs being of age.

9. The court failed to consider that the approval of the secretary of the interior, so strongly used by respondent as a judicial act, and not a ministerial act, was merely to guard against Indian improvidence; and to see that the Indian was paid a fair price for his land, and not for the purpose of acting judicially and placing an approved lease or deed beyond question.

10. The court failed to consider the fact that, even after a deed has been approved by the secretary of the interior, such secretary, acting ministerially and not judicially, the deed can be attacked collaterally on any invalidating ground.

11. The court failed to take into consideration the fact that the act of May 27th, 1902, set out on page 4 of the opinion in this action, was repealed by the Act of May 8th, 1906, known as 34 St. L., 182.

12. This court, in making up its opinion, failed to take into consideration the fact that the County Court of Buffalo County, South Dakota, had no jurisdiction to determine the heirs of Hin-Tun-Ka-Sau, or Weasel, to whom the land in controversy was originally allotted.

For the failure of the court to take into consideration the foregoing facts, we respectfully ask that a rehearing be granted for the purpose of more fully showing to the court why a reversal of the judgment of the trial court should not be had, in view of the importance of the question involved.

Respectfully,

GEO. W. EGAN,
Attorney for Plaintiff and
Appellant Pro Sese.

293 [Endorsed:] 3643. Egan vs. McDonald. Copy. Petition for Rehearing. Supreme Court, State of South Dakota. Filed Sep. 6, 1915. E. F. Swartz, Clerk.

294 And that afterwards, to-wit, on the 24th day of September, 1915, defendant and respondent filed his answer to plaintiff's petition for rehearing, which in words and figures is as follows, to-wit:

295 In the Supreme Court of the State of South Dakota.

No. 3643.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Answer to Petition for Rehearing.

The defendant and respondent in this action, for his answer to the petition of the plaintiff and appellant herein for a re-hearing, respectfully suggests to the Court that a careful reading of the said petition for re-hearing fails to show any reason for granting the said petition. All of the grounds urged by the appellant in the said petition for a re-hearing were discussed in the various briefs of the appellant and the respondent, and in the oral argument herein, and have been presented to and considered by this Court. The opinion of the Court, filed herein on August 7, 1915, is comprehensive, and states ample reasons for sustaining the judgment and the order of the Circuit Court of Minnehaha County, appealed from herein, and the respondent submits that no good reason is shown by the said petition for granting a re-hearing herein, or for modifying or changing in any respect the said opinion.

Respectfully submitted,

BAILEY & VOORHEES,
Attorneys for Defendant and Respondent.

296 [Endorsed:] 3643. In the Supreme Court of the State of South Dakota. George W. Egan, Plaintiff and Appellant, vs. Charles S. McDonald, Defendant and Respondent. Copy. No. 3643. Answer to Petition for Rehearing. Supreme Court, State of South Dakota. Filed Sep. 24 1915. E. F. Swartz, Clerk. Bailey & Voorhees, Attorneys for Defendant, Sioux Falls, S. D.

297 And I hereby certify that thereafter, and on the 11th day of October, 1915, said cause was called in open court on the petition of the plaintiff and appellant aforesaid for a rehearing of said appeal, and that said petition was by the Court denied in open court; and that the same is now of record in this Court, and that no written order denying the petition was handed down; and that a rec-

ord of said proceeding is found on page 94 of Daily Journal of the Supreme Court of the State of South Dakota.

And thereafter, to-wit, on the 15th day of November, 1915, a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota was entered and filed, which in words and figures is as follows, to-wit:

298 In the Supreme Court of the State of South Dakota.

No. 3643.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. McDONALD, Defendant and Respondent.

Petition for Writ of Error.

To the Honorable James H. McCoy, Presiding Justice of the Supreme Court of the State of South Dakota, and to the other Justices of said Honorable Court, and to the Honorable the Supreme Court of the State of South Dakota:

The petition of George W. Egan, who resides in the city of Sioux Falls, in the County of Minnehaha, and state of South Dakota, respectfully presents and shows to the court:

1.

Heretofore and on or about the 24th day of June, 1912 an action was commenced in the Circuit Court in and for Minnehaha County, South Dakota wherein your petitioner, George W. Egan was plaintiff and Charles S. McDonald was defendant. That the complaint which was duly served therein, alleged that on the 15th day of April, 1911, plaintiff therein, your petitioner, and said Charles S. McDonald, defendant therein entered into a contract of purchase by plaintiff, George W. Egan, from defendant, Charles S. McDonald, of certain real estate described as the South half of Section Twenty one (21) Township One hundred and eight (108) North of
299 Range Seventy-two (72) West, in Buffalo County, South Dakota, at the agreed price of Four thousand dollars ($4,000.00); that plaintiff, your petitioner then paid to said defendant, Charles S. McDonald and deposited with him the sum of One thousand dollars ($1,000.00) as part of the purchase price, on condition that purchase should *should* be completed on March 1st, 1912, and an abstract furnished by said Charles S. McDonald, showing good merchantable title to said premises hereinbefore described and a Warranty Deed conveying good title should be delivered by said Charles S. McDonald, said defendant, as in said agreement specified. That said complaint further alleged that plaintiff, your petitioner, performed all the conditions on his part to be performed, and on March 1st, 1912, was ready, able and willing to receive said deed and

abstract as was specified in said agreement, and was ready, able and willing to pay the balance of the purchase price therefor. That said Charles S. McDonald, the defendant herein, on March 1st, 1912, failed and refused to deliver to your petitioner, plaintiff therein, a deed and abstract to said land pursuant to said agreement, and ever since said time has failed and refused to deliver the same. Said complaint further alleged that your petitioner, plaintiff therein, prior to the commencement of said action, made a written demand on the said defendant, Charles S. McDonald, for the repayment of said sum of One thousand dollars ($1,000.00); that defendant refused and still refuses to repay the same or any part thereof, and was justly indebted to your petitioner, plaintiff therein, in the sum of One thousand dollars ($1,000.00) with interest from April 15th, 1911, at seven per cent (7%) per annum. And said complaint demanded judgment against said defendant for said sum of One thousand dollars ($1,000.00) from April 15th, 1911, and his costs and disbursements of said action.

2.

Defendant duly answered said complaint, admitting the written agreement for the sale of said land, the payment of said sum
300 of One thousand dollars ($1,000.00) and the demand for the return of same, and denied all of the rest of the allegations of plaintiff's complaint. Subsequently the issues raised by the pleadings came on for trial before Hon. Joseph W. Jones, Judge of the Circuit Court in and for Minnehaha County, South Dakota, Second Judicial Circuit, with a jury, on December 11th, 1912. Upon the trial of said action the evidence introduced by plaintiff and defendant showed that the only title the said Charles S. McDonald had to the land in controversy was derived from a deed from certain Indians named Plays With Iron, Wounded Knee, and Mrs. Redwater, No. 2, who had been adjudged by the county court of Buffalo County, South Dakota, and alleged to be the only heirs of one Hin-Tun-Ka-Sau, or Weasel, a tribal Indian of the Crow Creek tribe of Sioux Indians, to whom a trust patent was issued on December 12th, 1895, under the provisions of the "general allotment act" approved February 8th, 1887, being also known as Chap. 119, Statutes at Large, the said trust patent being issued to said Hin-Tun-Ka-Sau, or Weasel, upon the opening of a portion of the Sioux Indian Reservation of South Dakota under the Act of Congress approved March 2nd, 1889, and known as 25 United States Statutes at Large, 888, the said reservation being opened under the provisions of the said "general allotment act" or Chap. 119 Statutes at Large, approved February 8th, 1887. At the close of all the testimony introduced in the case, your petitioner, plaintiff herein, moved the court for a directed verdict at the hands of the jury for the reason that the testimony failed to show that defendant, said Charles S. McDonald, had a merchantable title to the land in controversy, which motion the court granted, directed a verdict, and on December 13th, 1912 judgment was entered in favor of your petitioner and against said Charles S. McDonald, defendant therein, for the sum of $1,116.00 and costs of $42.05, making $1,158.05 in all.

3.

That on March 21st, 1913, said Charles S. McDonald, defendant therein, through his attorneys, Messrs. Bailey & Voorhees, of Sioux Falls, South Dakota, served his Notice of Intention to Move for a New Trial, and the necessary transcript of evidence and As-
301 signments of Error, in conformity with the practice for the making of motions for a new trial in this state of South Dakota. On April 9th, 1913, said motion was duly argued by counsel for said Charles S. McDonald, said defendant, and your petitioner, in pro sese, which motion for a new trial was granted by the court, by order dated April 26th, 1913. That said order granting a new trial was duly filed in the office of the clerk of the circuit court of Minnehaha County, South Dakota on April 30th, 1913.

4.

That on the 19th day of February, 1914, pursuant to the order of the court granting defendant, Charles S. McDonald, a new trial in this action, said action was again brought on for trial in the Circuit Court of Minnehaha County, South Dakota, before the Hon. Joseph W. Jones, Judge of said court, without a jury, the case being tried on the same testimony and with the same exhibits admitted on the former trial of this action, this being done under stipulation of counsel for plaintiff and defendant, dated February 18th, 1914. Upon the second trial of this action the court made and entered a judgment in favor of defendant, Charles S. McDonald and against your petitioner, plaintiff therein, said judgment being dated February 19th, 1914, and filed in the office of the clerk of the Circuit Court of Minnehaha County, South Dakota, on said 19th day of February, 1914, said judgment particularly finding that defendant's title to the land in controversy was good and merchantable, and dismissing the action, with costs to defendant, afterwards taxed in the sum of $64.45. Subsequently thereto, to-wit: on April 25th, 1914, your petitioner, plaintiff therein, duly served upon counsel for defendant Charles McDonald, his Notice of Intention to Move for a New Trial, counsel for plaintiff and defendant having previously stipulated in writing, by stipulation duly filed in the office of the clerk of said court, that the testimony taken at the former trial of said action might be used on said motion for a new trial, and also having previously
302 stipulated, by written stipulation duly filed with the clerk of said court, that the abstract of title, and the deed to the premises had been tendered to your petitioner on January 6th, 1914, and performance of contract demanded and performance refused, and that said evidence had been offered at the trial, objected to by plaintiff, and objection sustained by the court. On said 25th day of April, 1914, the said motion for a new trial was heard by the court on stipulation of counsel for plaintiff and defendant, and said motion was, by order dated April 25th, 1914, denied by the court, said order denying motion for a new trial being duly filed in the office of the clerk of Circuit Court of Minnehaha County, South Dakota, on April 27th, 1914, and an exception was duly taken to the order of

the court denying said motion for a new trial, and the exception allowed.

5.

That on the 20th day of June, 1914, your petitioner, plaintiff herein, duly served upon counsel for defendant, and upon the clerk of the Circuit Court of Minnehaha County, South Dakota, as required by the statutes of South Dakota, his Notice of Appeal to the Supreme Court of South Dakota together with a sufficient bond or undertaking on appeal to said court, in a sum required by law, and on said day filed said Notice of Appeal, and Undertaking on Appeal to the said Supreme Court in the office of the clerk of said Circuit Court of Minnehaha County, South Dakota, after said undertaking, as to its sufficiency and the sureties thereon, had been approved by the clerk of said court. That the appeal to the Supreme Court of South Dakota was from the order of the court denying the plaintiff's motion for a new trial, and from the judgment rendered in said action by the court on February 19th, 1914. That within the time required by law, plaintiff and appellant duly served and filed in the office of the clerk of the Supreme Court of South Dakota his brief and abstract in the above action, to which defendant and respondent filed his brief in answer thereto, and plaintiff and appellant filed his reply brief thereto. That subsequently thereto, by stipula-
303 tion of counsel for plaintiff and appellant, and defendant and respondent, and by leave of court duly obtained, a further or additional brief citing further authorities and calling the attention of the Supreme Court of South Dakota to the Federal question involved in this case, and the importance thereof, was filed, and the case was properly before the court. That this case was on the calendar of this court for the regular April, 1915, term thereof, and was argued orally before the full court on April 14th, 1915. That in an opinion by S. C. Polley, J., filed on the 7th day of August, 1915, the Supreme Court of South Dakota affirmed the judgment of the Circuit Court of Minnehaha County, South Dakota. Within the time provided for by the statutes of South Dakota plaintiff and appellant duly made and filed his petition for a rehearing in said case, which petition was entertained by the court and considered by it, and on the 11th day of October, 1915, the said petition for a rehearing was denied, and on said day the remittitur in said action was duly forwarded to the clerk of the Circuit Court of Minnehaha County, South Dakota, and the 13th day of October, 1915, same was duly received by the clerk of said court and filed therein, and defendant given judgment for the costs of said appeal, duly taxed by defendant and respondent in the sum of $123.25, said costs being in addition to the costs of defendant Charles S. McDonald, in the Circuit Court of Minnehaha County, South Dakota, taxed at sum of $64.45, as hereinbefore alleged.

6.

That upon the trial of said action, plaintiff, your petitioner insisted and argued to the court that the title acquired by the said Hin-

Tun-Ka-Su, or Weasel, by the trust patent issued to him on December 12th, 1895, conferred on him merely a possessory right of occupancy for the period of twenty-five years, according to the terms of the patent itself, and that the heirs of the said Indian received no better title, and could transfer no better title to the grantees than said Indian had, and that the County Court of Buffalo County, South Dakota, had no jurisdiction to determine the *the* heirship of
304 the said Indians alleged to be the descendants of the original owner or possessor of the land, and his decree carried with it no title. On the first trial of this action, in the Circuit Court of Minnehaha County, South Dakota, the judge of the said court sustained plaintiff's contention, and held the title to said land was not merchantable, but upon the second trial of said action expressly held the title was merchantable, and the county court of Buffalo County had jurisdiction in the matter, and overruled your petitioner's contention. That upon his appeal of said action to the Supreme Court of South Dakota, plaintiff, your petitioner, made the same contention and urged and argued the same to the court both in his brief and upon the oral argument of said case before the court, but his contention was not sustained by said Supreme Court. That upon the petition for rehearing filed by your petitioner, plaintiff and appellant herein, he called attention particularly to this contention as one of the grounds why a rehearing should be granted, but said rehearing was not granted by the Court. That when the Supreme Court of South Dakota denied plaintiff and appellant's petition for rehearing on October 11th, 1915, and ordered the remittitur sent down to the lower court, to-wit: the Circuit Court of Minnehaha County, South Dakota, said decision on the part of said Supreme Court became a final judgment in this action, the said Supreme Court being the highest court of the state of South Dakota.

7.

That throughout both trials of this case in the Circuit Court of Minnehaha County, South Dakota, and in his brief in the Supreme Court petitioner contended that under the Federal statutes and decisions the land involved in this case was held in trust by the government of the United States because the limitation had not expired; that the trust patentee, named Hin-Tun-Ka-Sau or Weasel could not have conveyed a good title, and that being so, his heirs could not convey a good title, particularly in view of the fact that that class of persons was and is mere wards of the government, and could
305 have only such power to sell or dispose of property given them as is expressly conferred by Congress. That the said decisions of the courts and judges and each of them, denied to your petitioner, a title, right, privilege and immunity held by your petitioner under the statutes of the United States and clearly presents and involves the construction and effect of the statutes of the United States.

Wherefore your petitioner prays that a writ of error may issue, and he may be allowed to bring up for review before the Supreme Court

of the United States the said judgment of the Supreme Court of South Dakota; and that your petitioner may have such other and further relief in the premises as may be just, and your petitioner will ever pray.

GEO. W. EGAN.

GEO. W. EGAN,
Attorney pro sese,
Sioux Falls, South Dakota.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

George W. Egan, being first duly sworn, deposes and says: that he is the foregoing petitioner; that the foregoing petition is true of his own knowledge except as to the matters and things therein alleged to be upon information and belief and as to those he believes it to be true.

GEO. W. EGAN.

Subscribed and sworn to before me this 6th day of November, 1915.

[Seal W. H. Shurtleff, Notary Public, South Dakota.]

W. H. SHURTLEFF,
Notary Public,
Minnehaha County, South Dakota.

306 [Endorsed:] 3643. Egan vs. McDonald. Petition for Writ of Error. In re Appeal to U. S. Supreme Court. Supreme Court, State of South Dakota. Filed Nov. 15, 1915. E. F. Swartz, Clerk.

307 And on the same day, together with said petition, assignment of errors was filed by the said plaintiff and appellant in words and figures as follows, to-wit:

308 In the Supreme Court of the State of South Dakota.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. MCDONALD, Defendant and Respondent.

Assignment of Errors.

And now comes George W. Egan, plaintiff and appellant in the above entitled action, by himself as attorney pro sese, and makes and files his assignment of errors:

1. The Circuit Court in and for Minnehaha County, South Dakota, erred in granting a new trial to the defendant in said court, Charles S. McDonald, respondent herein, by its order dated April 26th, 1913, filed in the office of the clerk of the Circuit Court of Minnehaha County, South Dakota on April 30th, 1913, recorded in Judgment

Book "28" page 149, for the reason that the evidence in the first trial of the above entitled action in the Circuit Court of Minnehaha County, South Dakota showed beyond a reasonable doubt that the title said defendant and appellant, Charles S. McDonald had to the land in controversy in this action, was not good or merchantable being based upon a patent issued to one Hin-Tun-Ka-Sau, or Weasel, which patent, by its terms conferred only a possessory title in him, for a period of twenty five years, said patent being dated December 12th, 1895, and conferred no title which the said Indian or his heirs could sell or transfer, and for the further reason that the county court of Buffalo County, South Dakota had no jurisdiction to determine the heirship of said alleged heirs of said Indian to whom patent was issued, and could not decree the land in controversy to said alleged heirs, or any other heirs of said Indian, and had no jurisdiction over said land at all.

309 2. The Circuit Court in and for Minnehaha County, South Dakota, erred in rendering judgment, dated February 19th, 1914, filed in the office of the Clerk of Circuit Court of Minnehaha County, South Dakota, on February 19th, 1914, and recorded in Book "28" of Judgments, page 445, in favor of the defendant and respondent, Charles S. McDonald, and against the plaintiff and appellant, George W. Egan, for the reason that the testimony in the second trial of said action, and on which the said judgment was based, showed conclusively that the title of said Charles S. McDonald, defendant and respondent, to the land in question, was not good and merchantable, said title being derived from an Indian Trust Patent, issued to one Hin-Tun-Ka-Sau, or Weasel, dated December 12th, 1895, on the opening of the portion of the Sioux Indian Reservation in the then territory of Dakota, now state of South Dakota, the Indian to whom the patent was issued, being then a tribal Indian, a member of Crow Creek tribe of Sioux Indians. The opening of said reservation was under the provision of the "gerneral allotment act" being Chap. 199, Statutes at Large, approved February 8th, 1887. That said patent, by its terms conferred upon the patentee merely a possessory right of occupancy of said land for a period of twenty five years from the date of its issuance, and the heirs of said Indian could obtain no better right than said Indian had to whom the patent was issued, and the County Court had no jurisdiction to determine the heirship of said deceased Indian, Hin-Tun-Ka-Sau, or Weasel; no jurisdiction to decree the land to any heirs after determined, and no jurisdiction over the land in any manner.

3. The Circuit Court in and for Minnehaha County, South Dakota erred in holding in its judgment, dated February 19th, 1914, filed in the office of the clerk of said Court February 19th, 1914, recorded in Book "28" of Judgments, page 445, as follows:

"And the Court having considered the evidence herein, and being of the opinion and hereby deciding that the title to the property described in the complaint herein, to-wit: South half (S. ½) of Section Twenty one (21) in township one hundred and eight

310 (108) North, of Range Seventy two (72) West of the Fifth Principal Meridian, situated in the County of Buffalo, and state of South Dakota, was good and merchantable"—

for the reason that the testimony in the case showed that the only title held by the said Charles S. McDonald was through an Indian Trust Patent, issued to one Hin-Tun-Ka-Sau, or Weasel December 12th, 1895, on the opening of the portion of the Sioux Indian Reservation in Dakota, set forth in the Act opening the same, being 25 Stat. at Large, 888, approved March 2nd, 1889, said Act being passed under the provisions of the "general allotment act" approved February 8th, 1887, said patent, by its terms, retaining title in the government of the United States for a period of twenty five years, and giving the patentee merely a possessory title, and any heirs of an Indian could get or transfer no better title than what their ancestor had, and for the further reason that a county court would have no jurisdiction either to determine heirship of the alleged heirs of any deceased Indian holding the land under such a patent, or to decree the property, and would have no jurisdiction to decree the land in any manner.

4. The Circuit Court of Minnehaha County, South Dakota erred, in dismissing plaintiff and appellant's cause of action, by its judgment of February 19th, 1914, filed in the office of the clerk of said Court on same date, and recorded in Judgment Book "28" page 445, for the same reason.

5. The Circuit Court of Minnehaha County, South Dakota erred in allowing costs to said Charles S. McDonald, defendant and respondent, in said judgment of February 19th, 1914, for the same reasons.

6. The Circuit Court of Minnehaha County, South Dakota, erred in denying motion for a new trial of plaintiff and appellant in the above entitled action, by its order dated April 25th, 1914, and filed in the office of the clerk of the Circuit Court of Minnehaha County, South Dakota, on April 27th, 1914, and recorded in Judgment Book "28" page 510, for all of the foregoing reasons.

7. The Supreme Court of the state of South Dakota erred
311 in affirming the judgment of the Circuit Court of Minnehaha County, South Dakota, in the opinion of Judge S. C. Polley, filed August 7th, 1915, and holding the title of defendant and respondent, Charles S. McDonald, to be good and merchantable, for the reason that the only title which the evidence shows said defendant and respondent had was through an Indian Trust Patent issued to Hin-Tun-Ka-Sau, or Weasel, a tribal Indian, and deeded to the grantor of said Charles S. McDonald by the alleged heirs of the deceased patentee, said patent, by its terms conferring a possessory right on the Indian, reserving the fee title to the United States. That the legal title remained in the United States for a period of twenty five years after the date of the issuance of the patent, December 12th, 1895, which time had not expired, and the heirs of said Indian could pass no better title than the Indian had, and the County Court of Buffalo County, South Dakota had no jurisdiction to determine the heirs of the deceased patentee, as that is, by law, reserved to, and under the laws of the United States, said Indians being wards of the United States Government, and the county court could not decree the land to the alleged heirs of said Indian, and had no jurisdiction over the land in any manner.

8. The Supreme Court of the state of South Dakota erred in hold-

ing, in its decision of the above entitled action, in the opinion filed August 7th, 1915, as follows, "From this it follows that respondent was possessed of a merchantable — to the allotment on the first day of March, 1912," for all the foregoing reasons.

9. The Supreme Court of the state of South Dakota erred in denying the motion of plaintiff and appellant for a rehearing petition for which was duly filed by him, and which was denied by said court on October 11th, 1915, for all of the reasons hereinbefore set forth.

GEO. W. EGAN,
Attorney pro sese,
Sioux Falls, So. Dak.

312 [Endorsed:] 3643. Egan vs. McDonald. Assignment of Errors. In re Appeal to U. S. Supreme Court. Supreme Court, State of South Dakota. Filed Nov. 15, 1915. E. F. Swartz, Clerk.

313 And afterwards, to wit, on the same day, order allowing writ of error was made and filed, which in words and figures is as follows, to-wit:

314 In the Supreme Court of the State of South Dakota.

No. 3643.

GEORGE W. EGAN, Plaintiff and Appellant,

vs.

CHARLES S. MCDONALD, Defendant and Respondent.

Order Allowing Writ of Error.

Comes now George W. Egan, the plaintiff in error and appellant above named on this 15th day of November, A. D. 1915, and files and presents to this court his Assignment of Errors, together with his Petition, praying for the allowance of a Writ of Error intended to be urged by him, and praying for the allowance of a Writ of Error urged by him and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States and that such other and further proceedings may be had in the premises as may be just and proper, and upon consideration of the said Petition and Assignment of Errors, this Court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented, it is by this Court

Ordered that a Writ of Error be allowed as prayed, provided, however, that said George W. Egan, plaintiff and appellant herein, give bond in the sum of Five Hundred Dollars ($500.00) to the State of South Dakota, to be approved by the Chief Justice of this
315 Court, conditioned that said George W. Egan shall prosecute his Writ of Error to effect and if he fails to make good his cause of action, shall answer all damages and costs that may be ad-

judged, which said bond, when so approved, shall operate as a supersedeas bond.

And it is further ordered, that upon the serving of said Writ of Error by lodging a copy thereof for the adverse party, Charles S. McDonald, in the clerk's office of this said Supreme Court for the state of South Dakota, where the record remains, and upon the giving and approval of said bond, the said Writ of Error shall operate as a supersedeas and all further proceedings herein be suspended and stayed until the final determination of said Writ of Error by the United States Supreme Court, and that in the meantime, and until the further order of this court and until the final determination of said Writ of Error by the United States Supreme Court, the record and papers in this case remain in this court.

In testimony whereof, witness my hand and seal of this Court this 15th day of November, 1915.

J. H. McCOY,
Presiding Judge of the Supreme Court of the State of South Dakota.

[Seal Supreme Court, State of South Dakota.]

Attest:
E. F. SWARTZ,
Clerk of the Supreme Court of the State of South Dakota.
By S. G. DE LAND,
Deputy.

316 [Endorsed:] 3643. Egan vs. McDonald. Order Allowing Writ of Error. Supreme Court, State of South Dakota. Filed Nov. 15, 1915. E. F. Swartz, Clerk.

317 And afterwards, to-wit, on the 23rd day of November, 1915, bond on writ of error was filed by the said plaintiff and appellant, which in words and figures is as follows, to-wit:

318 In the Supreme Court of the United States.

GEORGE W. EGAN, Plaintiff in Error,

vs.

CHARLES S. MCDONALD, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents: That we, George W. Egan as principal, and M. H. Egan and Henry A. Homan of the County of Minnehaha and State of South Dakota as sureties, are held and firmly bound unto the state of South Dakota in the sum of Five hundred Dollars to be paid to it and for the payment of which, well and truly to be — we bind ourselves and each of us, our and each of — suc-

cessors, heirs, administrators, executors and assigns jointly and severally, firmly by these presents, signed and sealed with our seals this 17th day of November, in the year of our Lord, One thousand, Nine Hundred and Fifteen.

Whereas the above named George W. Egan, plaintiff in error, seeks to prosecute his Writ of Error in the Supreme Court of the United States to reverse judgment rendered on the 7th day of August, 1915, by the Supreme Court of the state of South Dakota, in and action in which George W. Egan was plaintiff and appellant, and Charles S. McDonald was defendant and respondent, and is defendant in error herein, and in which the petition for a rehearing in said
319 action was denied by the court October 11th, 1915, and said action finally determined and final judgment rendered on said date.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error, George W. Egan, shall prosecute his Writ of Error to effect and answer all costs and damages that may be adjudged, if he fail to make good his cause of action then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof the principal and said sureties have duly signed and sealed the same.

GEO. W. EGAN.
M. H. EGAN, *M. D.*
HENRY A. HOMAN.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

On this 17th day of November, 1915, before me a Notary Public within and for the said County and State personally appeared George W. Egan and M. H. Egan and Henry A. Homan to me known to be the persons who are described in and who executed the foregoing instrument and acknowledged to me that they executed the same as their free act and deed.

[Seal W. H. Shurtleff, Notary Public, South Dakota.]

W. H. SHURTLEFF,
Notary Public, South Dak.

My Commission expires March 28th, 1917.

Justification of Sureties.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

M. H. Egan and Henry A. Homan, whose names are subscribed as sureties to the above and foregoing bond, being severally and jointly sworn, each for himself says: that he is a resident and freeholder of the County of Minnehaha and State of South Dakota, and

is worth more than the sum in such bond specified as a pen-
320 alty over and above all his debts and liabilities in property in the state of South Dakota and by law exempt from execution in said State.

M. H. EGAN, *M. D.*
HENRY A. HOMAN.

Subscribed and sworn to before me this 17th day of November, A. D. 1915.

[Seal W. H. Shurtleff, Notary Public, South Dakota.]

W. H. SHURTLEFF,
Notary Public, South Dak.

My Commission expires March 28th, 1917.

Approval of Bond.

This bond is approved this 18th day of November, 1915.

J. H. McCOY,
Presiding Judge of the Supreme Court of the State of South Dakota.

321 [Endorsed:] 3643. Egan vs. McDonald. Bond on Writ of Error. U. S. Supreme Court. Supreme Court, State of South Dakota. Filed Nov. 23, 1915. E. F. Swartz, Clerk.

322 And on the same day, to-wit, on the 23rd day of November, 1915, writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota was filed, which original writ of error is hereto attached and herewith returned to the Supreme Court of the United States, as follows, to-wit:

323 In the Supreme Court of the United States.

GEORGE W. EGAN, Plaintiff in Error,

vs.

CHARLES S. McDONALD, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, in an action which is in the Supreme Court of the

State of South Dakota, before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between George W. Egan plaintiff in error and Charles S. McDonald, defendant in error wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty or statute of, or a commission held under, the United States, and the decision was against the title, right, privilege
324 or exemption specially set up or claimed under such clause of such constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said George W. Egan, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 14th day of January 1916 next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court of the United States, this 19th day of November, in the year of our Lord one thousand, nine hundred and fifteen.

[U. S. Dist. Court Seal, Dist. of Suth Dakota.]

OLIVER PENDER,
Clerk of the United States District Court
for the District of South Dakota.

325 [Endorsed:] 3643. Egan vs. McDonald. Writ of Error. U. S. Supreme Court. Supreme Court, State of South Dakota. Filed Nov. 23, 1915. E. F. Swartz, Clerk.

326 And on the same day, to-wit, on the 23rd day of November, 1915, a citation by the Presiding Judge of the Supreme Court of the State of South Dakota was issued and filed, the same having been on the 19th day of November, 1915, served upon the attorneys for the defendant in error, Charles S. McDonald, herein, which citation is in words and figures as follows, to-wit:

327 In the Supreme Court of the State of South Dakota.

GEORGE W. EGAN, Plaintiff in Error,

vs.

CHARLES S. McDONALD, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles S. McDonald, defendant in error, above named, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C. within sixty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of South Dakota, wherein George W. Egan is plaintiff in error, and you, Charles S. McDonald are defendant in error, to show cause, if any there be, why the judgment against the said plaintiff in error, as in said Writ of Error mentioned, shall not be corrected, and why speedy justice shall not be done the parties in that behalf.

Witness: the Presiding Judge of the Supreme Court of the State of South Dakota, this 18th day of November, 1915.

J. H. McCOY,
Presiding Judge of the Supreme Court of the State of South Dakota.

[Seal Supreme Court, State of South Dakota.]

Attest:
E. F. SWARTZ,
Clerk of the Supreme Court of the State of South Dakota.

328 [Endorsed:] 3643. Egan vs. McDonald. Citation. Supreme Court, State of South Dakota. Filed Nov. 23, 1915. E. F. Swartz, Clerk. Due and personal service of the within Citation is hereby admitted at Sioux Falls, S. D., this 19th day of November, 1915. Bailey & Voorhees, Attorneys for Defendant in Error.

329 And afterwards, to-wit, on the 7th day of December, 1915, the plaintiff in error herein filed in my office a præcipe, bearing due proof of service thereof upon the attorneys for the defendant in error herein, which said præcipe is in words and figures as follows, to-wit:

330 In the Supreme Court of the State of South Dakota.

GEORGE W. EGAN, Plaintiff in Error,

vs.

CHARLES S. McDONALD, Defendant in Error.

Præcipe for Record.

To the Clerk of the Supreme Court of the State of South Dakota:

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Supreme Court, at Washington, D. C., under a Writ of Error heretofore sued out to said Court and include in said transcript of record the following pleadings, proceedings and papers on file, to-wit:

1. Citation and service.
2. Writ of Error and Return.
3. Complaint of Plaintiff in Error.
4. Answer of Defendant in Error.
5. Record of trial showing all testimony taken.
6. Deposition of E. E. Pierson.
7. Exhibit "B" of Plaintiff in Error.
8. Exhibit "C" G. M. H. of Plaintiff in Error.
9. Exhibit "D" of Plaintiff in Error.
10. Exhibit "E" of Plaintiff in Error.
11. Exhibit "F" of Plaintiff in Error.
12. Exhibit "G" of Plaintiff in Error.
13. Exhibit "2" G. M. H. of Defendant in Error, being abstract of title to land in controversy herein.
14. Exhibit "3" G. M. H. of Defendant in Error, being attached to Exhibit "2" G. M. H. of Defendant in Error, said Exhibit
331 "3" being certified copy of Final Decree of the County Court of Buffalo County, South Dakota in the estate of Hin-Tun-Ka-Sau, or Weasel.
15. Exhibit "B" G. M. H. of Defendant in Error attached to Exhibit "2" of Defendant in Error, being copy of Trust Patent issued to Hin-Tun-Ka-Sau, or Weasel, for the land in controversy in the above entitled action, dated December 12th, 1895.
16. That part of the record of the trial showing the motion for direction of verdict on the part of the Plaintiff in Error at the close of the first trial; the granting of the motion by the court, and the verdict of the jury.
17. Verdict of jury on first trial.
18. Judgment of court in favor of plaintiff in error on first trial, dated December 12th, 1912.
19. Order of Court dated April 26th, 1913, granting a new trial in above entitled action to Plaintiff in Error.
20. Stipulation signed by counsel for plaintiff in Error and Defendant in Error dated February 18th, 1914 and filed in office of clerk of Circuit Court of Minnehaha County, South Dakota on February 21st, 1914.

21. Judgment of Circuit Court of Minnehaha County, So. Dak. dated February 19th, 1914, in favor of Defendant in Error and against Plaintiff in Error, filed in office of clerk of Circuit Court of Minnehaha Co., So. Dak., February 19th, 1914, recorded in Judgment Book "28" page 445.

22. Stipulation between counsel for Plaintiff in Error and for Defendant in Error, dated March 27th, 1914, and filed in clerk's office of said Court.

23. Stipulation regarding evidence, signed by counsel for plaintiff in Error and Defendant in Error, dated April 21, 1914, and duly filed in office of the Clerk of said Court.

24. Notice of Intention to Move for a New Trial of Plaintiff in Error.

25. Order of Court dated April 25, 1914, denying motion for a New Trial of Plaintiff in Error, said order being filed in the office of the Circuit Court of Minnehaha County, South Dakota May 2nd, 1914, and recorded in Book "28" page 510, and showing exception to order.

26. Notice of Appeal to the Supreme Court of South Dakota, together with admissions of service thereon, of counsel for Defendant in Error.

27. Undertaking on Appeal to the Supreme Court of South Dakota, together with admission of service thereon.

28. Opinion of Supreme Court of South Dakota dated August 7th, 1915.

29. Order of Supreme Court of South Dakota dated October 11th, 1915, denying petition for rehearing filed by Plaintiff in Error.

30. Bond on Writ of Error.

31. Præcipe for Record.

32. Statement of Errors and designation by Plaintiff in Error of parts of record to be printed.

332 And the said transcript to be prepared as required by law and the rules of this court and the rules of the United States Supreme Court, and on file in the office of the Clerk of the Supreme Court of the United States at Washington, D. C. before January 14th, 1916.

GEO. W. EGAN.
Attorney pro sese for Plaintiff in Error.

Due and personal service of the above Præcipe for Record is hereby admitted, at Sioux Falls, South Dakota this 6th day of December, A. D. 1915, by true and correct copy thereof.

BAILEY & VOORHEES.
Attorneys for Defendant in Error,
Sioux Falls, S. D.

333 [Endorsed:] 3643. Egan vs. McDonald. Præcipe by Appellant. Supreme Court, State of South Dakota. Filed Dec. 7, 1915. E. F. Swartz, Clerk.

334 And on the same date, to wit, December 7, 1915, the plaintiff in error herein filed in my office his prayer for reversal

of the judgment and decree of the Supreme Court of the State of South Dakota, which prayer is in words and figures as follows, to-wit:

335 In the Supreme Court of the State of South Dakota.

GEORGE W. EGAN, Plaintiff in Error,

vs.

CHARLES S. MCDONALD, Defendant in Error.

Prayer for Reversal.

Comes now the above named Plaintiff in Error, George W. Egan, by himself as Attorney Pro Sese: and prays the Honorable Supreme Court of the United States to reverse the judgment and decree of the Supreme Court of the State of South Dakota, in the above entitled action, in an opinion filed August 7th, 1915, in favor of the Defendant in Error and against the Plaintiff in Error, and also the decision and order of the said Supreme Court of the State of South Dakota, refusing a rehearing by said court and denying same upon the petition of Plaintiff in Error, said order refusing and denying said rehearing being dated October 11th, 1915, and that the said Supreme Court of the State of South Dakota be ordered to enter a judgment in the above entitled action, reversing the decision and judgment of the lower court, to-wit: the Circuit Court in and for Minnehaha County, South Dakota; and that Plaintiff in Error may have such other and further relief in the premises as may be just, and your petitioner, said Plaintiff in Error, will ever pray.

GEO. W. EGAN,
Attorney for Plaintiff in Error, Sioux Falls, S. D.

336 [Endorsed:] 3643. Egan vs. McDonald. Prayer for Reversal. Supreme Court, State of South Dakota. Filed Dec. 7, 1915. E. F. Swartz, Clerk.

337 And thereafter, to-wit, on the 18th day of December, 1915, the defendant in error herein, by his attorneys, filed in my office a præcipe, which is in words and figures as follows, to-wit:

338 In the Supreme Court of the United States.

GEORGE W. EGAN, Plaintiff in Error,

vs.

CHARLES S. MCDONALD, Defendant in Error.

Præcipe of Defendant in Error for Record.

To the Clerk of the Supreme Court of the State of South Dakota:

You are hereby notified that the defendant in error in this action desires to have incorporated into the transcript of the record of this

action to be filed in the Supreme Court of the United States the following portions of the record in this action in addition to those designated by the plaintiff in error herein in his præcipe for the record herein;

1. Defendant's Exhibit 6.
2. Defendant's Exhibit 2, complete as shown at pages 75 to 88 inclusive and pages 90 to 97 inclusive of the original settled record herein.
3. Stipulation signed by the parties herein dated March 27, 1914, and filed May 2, 1914, regarding use of transcript of testimony on first trial.

BAILEY & VOORHEES,
Attorneys for Defendant in Error.

[Endorsed:] 3643. Egan vs. McDonald. Præcipe of Respondent. Supreme Court, State of South Dakota. Filed Dec. 18, 1915. E. F. Swartz, Clerk.

339 And I further certify that no fuller or more complete return to the said præcipe filed by plaintiff and appellant and the said præcipe filed by defendant and respondent, than is herein contained, is made, for the reason that the original papers and exhibits mentioned in said præcipes were a part of the original record made in the trial court, which said record, together with the original papers and exhibits referred to, was not before this Court, except as the same is set forth or referred to in the briefs filed by said plaintiff and appellant and by said defendant and respondent, as heretofore set forth and certified.

340 And I further certify that the within and foregoing are true copies of original papers, or are the original papers, as indicated, and constitute a complete transcript and return to the writ of error hereto attached, in the action in this Court wherein George W. Egan is plaintiff and appellant, and Charles S. McDonald is defendant and respondent.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of South Dakota, at my office in the Capitol, in the City of Pierre, County of Hughes and State of South Dakota, this 28th day of December, in the Year of our Lord One Thousand Nine Hundred and Fifteen.

[Seal Supreme Court, State of South Dakota.]

E. F. SWARTZ,
Clerk of the Supreme Court,
State of South Dakota.

Endorsed on cover: File No. 25,099. South Dakota Supreme Court. Term No. 88. George W. Egan, plaintiff in error, vs. Charles S. McDonald. Filed January 21st, 1916. File No. 25,099.

Office Supreme Court, U. S.
FILED
NOV 17 1917
JAMES D. MAHER,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 88.

GEORGE W. EGAN, PLAINTIFF IN ERROR,

vs.

CHARLES S. McDONALD.

MOTION TO CONTINUE CASE AND AFFIDAVITS IN SUPPORT OF SAME.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 88.

GEORGE W. EGAN, *Plaintiff in Error,*

vs.

CHARLES S. McDONALD, *Defendant in Error.*

Affidavit of Service.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Walter H. Shurtleff, being first duly sworn, says that he is a practicing attorney, and a resident of the city of Sioux Falls, Minnehaha County, South Dakota, and over twenty-one years of age; that he did, on the 14th day of November, 1917, serve a true and correct copy of the attached notice of motion and affidavits in the above-entitled action on J. H. Voorhees, one of the firm of Bailey & Voorhees, attorneys for defendant in error, by delivering to and leaving with him such true and correct copy at his offices in the Bailey-Glidden Block in the city of Sioux Falls, Minnehaha County, South Dakota.

WALTER H. SHURTLEFF.

Subscribed and sworn to before me this 14th day of November, 1917.

[SEAL.] L. E. WAGGONER,
Notary Public, South Dakota.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 88.

GEORGE W. EGAN, *Plaintiff in Error,*

vs.

CHARLES S. McDONALD, *Defendant in Error.*

To the above-named defendant, and to Bailey & Voorhees, his attorneys:

Please take notice:

That the plaintiff in error in the above-entitled action, being No. 88 of the October, 1917, Term of this court, will, on the 19th day of November, 1917, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, move the honorable judges of said court for an order continuing the above-entitled action and the argument thereon to the April, 1918, Term of said court; that said motion will be based upon the affidavit of George W. Egan, plaintiff in error and attorney *pro sese*, which is hereto annexed and herewith served upon you, and upon all of the records and files in said action.

Dated at Sioux Falls, South Dakota, November 14, 1917.

GEORGE W. EGAN,
Plaintiff in Error and Attorney Pro Sese.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 88.

GEORGE W. EGAN, *Plaintiff in Error,*

vs.

CHARLES S. McDONALD, *Defendant in Error.*

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

George W. Egan, being first duly sworn, says that he is a resident and citizen of the city of Sioux Falls, Minnehaha County, State of South Dakota, and is the plaintiff in error in the above-entitled action, and attorney *pro sese;* that the above-entitled action is an action brought by plaintiff in error, this affiant, to determine the title to certain lands and premises in Buffalo County, South Dakota, same being an Indian Allotment, the instrument evidencing the allottee's title being designated as a "Trust Patent," issued in December, 1895, under the provisions of the act opening a portion of the Sioux Indian Reservation in Dakota, being 25 Statutes at Large, 888, approved March 2, 1889, said act being passed under the provisions of the "general allotment act," approved February 8, 1887, being chapter 119, Statutes at Large.

That said action was started by plaintiff in error originally in the Circuit Court in and for Minnehaha County, South Dakota, and on February 20, 1914, a judgment was rendered in that court in favor of defendant in error and against plaintiff in error, and upon a new trial of said action being denied the case was appealed to the Supreme Court of the State of South Dakota; that on August 7, 1915, the Su-

preme Court of South Dakota affirmed the judgment of the lower court, and a rehearing having been subsequently denied by said court, a writ of error was sued out by affiant, plaintiff in error, to the Supreme Court of the United States, there being a Federal question involved in said case, which Federal question was raised in the Supreme Court of South Dakota and passed upon by such court.

That affiant has not been in the active practice of law for a period of about a year and a half last past, and turned over the preparation of this action to one Walter H. Shurtleff, Esq., of Sioux Falls, South Dakota, a practicing attorney in said city; that he has had the management of said case since the writ of error was sued out by this affiant, but that owing to the ill-health of said Walter H. Shurtleff he has not been able to do but very little towards the preparation of said case until recently, and was absent from the State of South Dakota for a period of about six months, and did not return to South Dakota until the summer of 1917; that during the summer of 1917 he was in the service of the United States Government for several weeks, and during said time was unable to do anything towards the preparation of said case for hearing.

That affiant was expecting to be able to secure a stipulation from counsel for defendant in error, and a stipulation was prepared by affiant and caused to be presented to counsel for defendant in error on November 9, 1917, but on November 13, 1917, was informed by said counsel that they could not sign said stipulation; that the question at issue in this case is an important question, not only to affiant, but to others as well having similar titles, and if the above action can be continued for hearing and argument to the next term of this court, affiant will promptly forward the necessary amount of money to have the record printed, and will immediately prepare the brief in said action, and no further extension of time will be asked for; that this application for a continuance of said case is not made for the purpose of hindering, de-

laying, or annoying defendant in error, but that justice may be done in said action.

Wherefore affiant asks that the above-entitled action may be continued from the October, 1917, Term of the Supreme Court of the United States to the April, 1918, Term of said court.

JOHN W. EGAN.

Subscribed and sworn to before me this 14th day of November, 1917.

[SEAL.] AGATHA T. GREEN,
Notary Public, South Dakota.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 88.

GEORGE W. EGAN, *Plaintiff in Error,*

vs.

CHARLES S. MCDONALD, *Defendant in Error.*

Affidavit.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

Walter H. Shurtleff, being first duly sworn, says that he is a resident of the city of Sioux Falls, Minnehaha County, South Dakota, and is an attorney and counselor at law in active practice, and maintains an office in said city of Sioux Falls; that he is acquainted with George W. Egan, plaintiff in error in the above-entitled action, and attorney *pro sese*,

and ever since the said George W. Egan ceased the active practice of law in April, 1916, affiant has been in charge of said action; that he has prepared all the papers and pleadings in said action since the said George W. Egan ceased the active practice of law in April, 1916, and is familiar with said action; that affiant, owing to ill-health, was obliged to give up the practice of law November 1, 1916, and go to the Pacific Coast, and did not return to South Dakota until June 1, 1917, or thereabouts, and for a period of several weeks in the months of July and August, 1917, was in the service of the United States Government and was absent from his office during said time.

That affiant is now in shape physically so he can go ahead with the preparation of said case for hearing and argument and prepare said brief therein; that if the above action and the hearing and argument thereof can be continued to the next term of this court, affiant can have the record therein printed, and the brief prepared promptly, and no further extension will be asked for by either affiant or plaintiff in error, but the case will be heard and argued at the next term of this court.

WALTER H. SHURTLEFF.

Subscribed and sworn to before me this 14th day of November, 1917.

[SEAL.] AGATHA T. GREEN,
Notary Public, South Dakota.

[Endorsed:] File No. 25,099. Supreme Court U. S., October Term, 1917. Term No. 88. George W. Egan, Plaintiff in Error, *vs.* Charles S. McDonald. Motion to continue case and affidavits in support of same. Filed November 17, 1917.

Office Supreme Court, U. S.
FILED
NOV 19 1917
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 88.

GEORGE W. EGAN, PLAINTIFF IN ERROR,

vs.

CHARLES S. McDONALD.

ANSWER TO MOTION FOR CONTINUANCE.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 88.

GEORGE W. EGAN, *Plaintiff in Error,*

vs.

CHARLES S. McDONALD, *Defendant in Error.*

Answer to Motion of Plaintiff in Error for a Continuance.

Now comes the defendant in error in this cause and in answer to the motion of the plaintiff in error herein, dated November 14, 1917, and noticed for hearing on November 19, 1917, for an order continuing this cause and the argument thereon to the next term of this court, presents the affidavit of John H. Voorhees, one of the attorneys for the defendant in error, which is hereto attached.

Dated November 16, 1917.

CHARLES O. BAILEY AND
JOHN H. VOORHEES,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 88.

GEORGE W. EGAN, *Plaintiff in Error,*

vs.

CHARLES S. McDONALD, *Defendant in Error.*

Affidavit of John H. Voorhees in Behalf of Defendant in Error in Answer to the Motion of the Plaintiff in Error for a Continuance.

STATE OF SOUTH DAKOTA,
County of Minnehaha, ss:

John H. Voorhees, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant in error in this cause, and that he has read the affidavits of George W. Egan, the plaintiff in error herein, and of Walter H. Shurtleff, made on the 14th day of November, 1917, in support of the motion of the plaintiff in error for a continuance of this cause over the October, 1917, term of this court.

Deponent further says that the decision of the Supreme Court of the State of South Dakota in this action, which is reported in 36 S. D., 92; 153 N. W., 915, was made in August, 1915.

Deponent further says that he is informed by the clerk of this court that this cause was docketed in this court on the 21st day of January, 1916, as No. 816 of the October term, 1915, and is now upon the calendar of the present October term, 1917, as case No. 88; that the record herein has not been printed and that the plaintiff in error has been

many times notified of the necessity of making a deposit to cover the cost of printing the record but has failed to make such deposit.

Deponent further says that the plaintiff in error for a number of years prior to April, 1916, was actively engaged in the practice of the profession of law in the State of South Dakota and elsewhere and that for two years or more prior to that time the said Walter H. Shurtleff was employed as a clerk in the office of the plaintiff in error and that the said Walter H. Shurtleff has during the larger portion of the time since April, 1916, been employed by the plaintiff in error or associated with him.

Deponent further says that he has been personally acquainted with the plaintiff in error for several years last past, and that at all times since this cause was so docketed in this court the plaintiff in error, said George W. Egan, has been financially able to pay the deposit which he was repeatedly notified by the clerk of this court to make to cover the expense of printing the said record.

Deponent further says with reference to the statement in the said affidavit of the plaintiff in error that he, the plaintiff in error, was expecting to be able to secure a stipulation from counsel for the defendant in error for the continuance of this cause and prepared and presented such a stipulation to counsel for the defendant in error on November 9, 1917; that neither the plaintiff in error nor said Walter H. Shurtleff ever expressed to counsel for defendant in error any desire for a continuance of the hearing on this cause over the present term of this court or said anything to counsel for the defendant in error with reference to such a continuance until the 10th day of November, 1917, when said Walter H. Shurtleff presented to deponent a stipulation for such continuance and asked him to sign the same and that deponent thereupon immediately informed said Walter H. Shurtleff that the counsel for the defendant in error were not in a position to sign such a stipulation.

JOHN H. VOORHEES.

Subscribed and sworn to before me this 16th day of November, 1917.

[SEAL.] E. DALLMAN,
Notary Public, Minnehaha County,
South Dakota.

[Endorsed:] File No. 25,099. Supreme Court U. S. October term, 1917. Term No. 88. George W. Egan, Pl'ff in Error, *vs.* Charles S. McDonald. Answer to motion of plaintiff in error for a continuance. Filed November 19, 1917.

(25,099)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 88

GEORGE W. EGAN, PLAINTIFF IN ERROR,

vs.

CHARLES S. McDONALD, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

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STATEMENT OF THE CASE.

This case is in this Court upon a writ of error sued out by the plaintiff in error to review a judgment rendered against him by the Supreme Court of the State of South Dakota. This is an action brought by the plaintiff in error, George W. Egan against the defendant in error, Charles S. McDonald, to recover the sum of one thousand dollars and interest thereon paid by plaintiff in error to defendant in error as part payment on certain land purchased by said plaintiff in error in Buffalo County, South Dakota, on April 15th, 1911, the balance to be paid on March 1st, 1912, when defendant in error should furnish said plaintiff in error with deed and an abstract showing merchantable title. Abstract was furnished on March 1st, 1912, but it failed to show a merchantable title in defendant in error, or any title in him. Plaintiff in error then gave said defendant in error notice of recission on account of the failure to deliver good title, demanded a return of the money paid, and when this was refused, begun an action in the Circuit Court in and for Minnehaha County, South Dakota, for the recovery of this money. The case was tried before Hon. Joseph W. Jones, Presiding Judge and a jury at Sioux Falls, Minnehaha County, South Dakota, on December 11th, 1912, and at the close of all the testimony, upon motion of plaintiff in error acting as attorney pro sese, a verdict was directed by the court in his favor and against defendant in error for the said one thousand dollars, interest and costs, and judgment on the verdict was duly rendered by the court and signed on December 13th, 1912, and filed in the office of the clerk of said court on said date. On March 21st, 1913, Messrs. Bailey & Voorhees, attorneys for defendant in error filed their Notice of Intention to Move for a New Trial, and their transcript of evidence and specifications or error; the motion was argued on April 9th, 1913, before the court and on April 26th, 1913, the court made its order granting said new trial which order was duly filed with the clerk of said court on April 30th, 1913. The case was tried before the court a second time, without a jury, using the same evidence, by stipulation of counsel for said parties, as was used on the first trial, and on February 19th, 1914, the court rendered judgment in favor of the defendant in error and against the plaintiff in error, the judgment reciting that the title to the premises in controversy was good, which judgment was duly filed in the office of the clerk of said Circuit Court in and for Minnehaha County, South Dakota. Subsequently a motion for a new trial was made by plaintiff in error herein, the same testimony being used for said motion for a new trial as was used by defendant in error in their motion for a new trial, and the motion was denied April 25th, 1914, and from said judgment

rendered by the court on February 19th, 1914, in favor of defendant in error and against plaintiff in error, and also from the court's order denying plaintiff in error a new trial, an appeal was perfected to the Supreme Court of the State of South Dakota, and abstracts, briefs and arguments served and filed therein.

The objection raised to the title to the land in controversy in Buffalo County, South Dakota by plaintiff in error was that it was based upon a Trust Patent issued to an Indian, and sold by his heirs before the expiration of the twenty-five year trust period, and this was brought out in the testimony in the trial of the case in the Circuit Court in and for Minnehaha County, South Dakota, and the question was raised in the Supreme Court of South Dakota and discussed in the brief of counsel for plaintiff in error, and the fact that a Federal question was involved, and that the Statutes of the United States were called in question was called to the attention of said court. The Supreme Court of South Dakota, in its opinion filed August 7th, 1915, affirmed the judgment of the Circuit Court of Minnehaha County, South Dakota. A petition for rehearing was filed within the time allowed by law, and the rehearing was denied by the Supreme Court of South Dakota on October 11th, 1915. The case was thereupon brought to this court upon a writ of error for review.

The plaintiff in error in his complaint alleged that on the 15th day of April, 1911, plaintiff and defendant entered into a contract for the purchase by plaintiff in error from defendant in error of certain real estate described as the South half of Section twenty-one (21) Township one hundred eight (108 North of Range seventy-two (72) West, in Buffalo County, South Dakota for the agreed price of $4,000.00; that plaintiff in error then deposited in the hands of defendant in error One thousand dollars ($1,000.00) as part of the purchase price on condition that the sale should be completed on March 1st, 1912, and an abstract showing good merchantable title and warranty deed conveying good title should be delivered by defendant in error; that plaintiff in error duly performed all the conditions of said contract on his part and on March 1st, 1912, was ready and willing to receive such deed and abstract specified in said agreement and pay the balance of the purchase money therefor; that defendant in error on March 1st, 1912, failed and refused to deliver to plaintiff in error the deed and abstract pursuant to said agreement, and ever since has refused to deliver the same; that plaintiff, prior to the commencement of the action had made a written demand upon defendant for the payment of the said sum of One thousand dollars ($1,000,00) which defendant refused to pay or any part thereof, and demanding judgment against said defendant for said sum of One thousand dollars ($1,000.00) and interest and costs of the action.

The defendant in error filed his answer admitting the contract and the payment of the One thousand dollars ($1,000.00) but denied that plaintiff in error had performed all the agreements on his part to be performed and that he was ready, able and willing to receive the deed and abstract mentioned in the agreement and pay the balance of the purchase money therefor; denied that he had failed and refused to deliver a deed and abstract to said land pursuant to said agreement; admitted the written demand upon him for the payment to plaintiff in error of the One thousand dollars ($1,000.00) paid, and prayed for the dismissal of the complaint and for his costs and disbursements.

On the trial of the case evidence was offered showing the following facts:

The plaintiff in error and defendant in error entered into a written contract on April 15th, 1911, for the purchase of property situated in Buffalo County, South Dakota, described as the South half of Section 21, Township 108 North of Range 72, West Fifth P. M. for the agreed price of $4,000.00 of which $1,000.00 was paid down by plaintiff in error, balance to be paid on March 1st, 1912, on the tendering to plaintiff in error by defendant in error of a warranty deed and an abstract showing good merchantable title in the defendant in error. About March 1st, 1912, plaintiff in error received from defendant in error an abstract of title to the lands in controversy which was examined and found defective. A written opinion was furnished and submitted to defendant in error with the abstract. On March 1st, 1912, and again on March 4th, 1912, plaintiff in error stated to defendant in error that he was ready to close the deal, but was advised by the latter to wait until the objections to the abstract had been met, and on March 4h, 1912, plaintiff in error returned the abstract to defendant in error with the advice that the title was not a merchantable one. The abstract furnished showed the following title:

Trans No. 1 showed Trust Patent, dated December 12th, 1895, issued by the United States to Hin-Tun-Ka-Sau, or Weasel, filed in the office of the Register of Deeds of Buffalo County, So. Dak. a copy of said Trust Patent being attached to the abstract, marked Exhibit "B" and being in words and figures as follows:

"To all whom these Presents shall come, greeting:

Whereas, there has been deposited in the General Land Office of the United States a schedule of allotments of land, dated April 9th, 1895, from the Commissioner of Indian Affairs, approved by the Secretary of the Interior August 9th, 1895, whereby it appears that under the provisions of the 11th Section of the Act of Congress approved March 2nd, 1889 (25 Stats. 888) Hin-Tun-Ka-Sau, or Weasel, an Indian residing on the Crow Creek Reservation, has been allotted the following described land, viz:

The South half of Section Twenty-one, in Township One Hundred and Eight, North of Range Seventy-two, West of the Fifth Principal Meridian in South Dakota, containing three hundred and twenty acres.

Now, know ye, that the United States of America, in consideration of the premises and in accordance with the provisions of the eleventh section of said act of Congress of the 2nd of March, 1889, hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said eleventh section) for the period of twenty-five years, for the sole use and benefit of said Hin-Tun-Ka-Sau, or Weasel, or in the case of his decease, for the sole use of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; provided that the president of the United States may, in his discretion, extend the said period by a term not exceeding ten years; and if any lease or conveyance shall be made of said lands, or any contract made touching the same before the expiration of the time above mentioned, such lease or conveyance or contract shall be absolutely null and void.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this twelfth day of December, in the year of our Lord one thousand eight hundred and ninety five and the independence of the United States the one hundred and twentieth.

(Seal of General Land Office.)

By the President
Grover Cleveland.
L. C. Q. Lamar
Recorder of the General Land Office.

By Mr. McKean.

Recorded Vol. 1, p. 275.

State of South Dakota, County of Buffalo, ss.

Filed for record April 24th, A. D. 1909, at 3 o'clock, P. M. and recorded in Book 9 of Deeds, on page 119.

By W. D. Kean, Register of Deeds,
By Fred J. Grace, Deputy.

Fee, 75.

(Tr. P. 25)

Transfer No. 2. Indian Deed, Inherited Lands, dated October 9th, 1908; Grantors; Plays With Iron, Wounded Knee, and Mrs. Red Water, No. 2 sole and only heirs of Weasel, deceased to R. J. Huston grantee, a copy of which was attached to the abstract, marked Exhibit "C" and is in words and figures as follows:

INDIAN DEED, INHERITED LANDS.

This indenture made and entered into this 9th day of October, One thousand nine hundred and eight, by and between Plays With Iron, Wounded Knee, Mrs. Red Water No. 2, of Buffalo County, So. Dak Sole and only heirs of Weasel, deceased, a Crow Creek Sioux Indian, party of the first part, and R. J. Huston, of Minnehaha Co., S. D., party of the second part, Witnesseth; that the parties of the first part, for and in consideration of the sum of $1,751.00 Seventeen Hundred Fifty-One Dollars in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said party of the second part the following described real estate and premises situated in Buffalo County, State of South Dakota, to-wit: the South Half of Section Twenty-one (21), Township One Hundred Eight (108) North, of Range Seventy-two (72) West 5th P. M. containing 320 acres, together with all the improvement thereon, and the appurtenances thereunto belonging, and warrant the title to the same.

To have and to hold the said described premises unto the said party of the second part, his heirs, executors, administrators and assigns, forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Plays With Iron (his x mark) (Seal)
Wounded Knee (His x Mark) (Seal)
Mrs. Red Water No. 2 (her x Mark) (Seal)

Witnesses, A. B. Chubbuck, Mark Wells.

The above deed duly sworn to before Don V. Moore, Notary Public in and for Buffalo County, South Dakota on October 9th, 1908. Then follows:

Department of the Interior, Office of Indian Affairs, February 27th, 1909. The within deed is respectfully submitted to the Secretary of the Interior, with the recommendation that it be approved.

F. M. Conser, Chief Clerk.

Department of the Interior, March 2, 1909.

The within deed is hereby approved.

Jms. Ellerson, Assistant Secretary.

Office of Indian Affairs, Land Division, March 26, 1909.

Recorded in Deed Book, Inherited Indian Lands, Vol. 19, page 337.

Filed for record in Buffalo County, South Dakota, April 20th, 1909, and recorded in Book 9 of Deed Records, page 110 (Tr. P. 73-74).

Transfer No. 3 shows a Warranty Deed, dated Nov. 3rd, 1910, describing the premises in controversy, from Robert J. Huston

and wife, grantors, to Charles S. McDonald, grantee, this defendant in error, showing a consideration of $5,000.00, which was filed in the office of the Register of Deeds of Buffalo County, South Dakota, April 17, 1910, and recorded in Record Book 10, page 82.

Transfer No. 4, shows a Final Decree of Distribution made by the Judge of the County Court of Buffalo County, South Dakota, distributing the land in controversy to Plays With Iron, Wounded Knee and Mrs. Red Water, No. 2 as the heirs of Weasel, deceased. A copy of the said decree was attached to the abstract, marked Exhibit "3" and is as follows:

State of South Dakota, County of Buffalo, ss. In County Court. Holding Terms at Gann Valley, South Dakota.

In the Matter of the Estate of Hin-Tun-Ka-Sau, or Weasel, deceased.

Final Decree of Distribution.

This cause, coming on regularly to be heard on the petition of Plays With Iron, filed in this Court, and having made and entered an order that the regular administration of said estate be dispensed with, and having on the 12th day of October, 1908 made and entered its Findings of Fact, and said estate is now in condition to be closed and to be divided among the heirs at law of said deceased, and on motion of A. B. Chubbuck, counsel for said petitioner.

It is hereby ordered, adjudged and decreed that the estate of the said deceased, hereinafter particularly describd and any other property not now known or discovered which may belong to said estate, or in which said estate may have an interest, be, and the same is hereby distributed to the following named persons who are decreed to be the sole heirs at law of said deceased, and now the sole and exclusive owners of said estate, in the proportions hereinafter named, viz:

Plays With Iron, and Wounded Knee, of Crow Creek, Buffalo County, S. D., each an undivided four-ninths (4/9th) of said estate.

Mrs. Red Water, No. 2, of Crow Creek, Buffalo County, S. D., an undivided one-ninth of said estate.

The following is a particular description of said estate referred to in said decree, and of which distribution is ordered, adjudged and decreed as aforesaid, the same being an allotment of land allotted to said deceased, under the law of the United States, alloting land to Crow Creek Sioux Indians, which said lands and premises are situated in the county of Buffalo and state of South Dakota, and described as follows, to-wit:

South half of Section Twenty-one (21) in Township One hundred and eight (108) North, of Range Seventy-two (72), West of the Fifth Principal Meridian, containing 320 acres.

Done in open court at Gann Valley, Buffalo County, South Dakota this 12th day of October, 1908.

By the Court

E. E. Dye,
Judge of the County Court.

Attest:

MILTON H. DERBY, JR., *Clerk.*
(Seal of County Court)

Attached there is Certificate of Milton H. Derby, Jr., clerk of the county court of Buffalo County, S. D. showing that the original Final Decree of Distribution, of which the above is a copy was filed in his office October 12th, 1908, and recorded in Book "3" of Probate Records, page 203.

Also attached thereto is certificate of C. B. Beelaman, clerk of the County Court of Buffalo County, S. D., dated March 6th, 1912, showing that the above copy of the Final Decree of Distribution in said estate is a true and correct copy of the original on file in his office.

Attached thereto is the certificate of the Register of Deeds of Buffalo County, S. D., showing that the above certified copy of Final Decree of Distribution was filed in his office March 6th, 1912, and recorded in Book 2 of Mis. Records, page 334 (Tr. pp. 23-24).

The evidence will further show that the Memorandum of Sale was made between the parties hereto on April 15th, 1911; that about March 1st, 1912, the time when the deal was to have been closed between the parties, an abstract was furnished plaintiff in error, the material parts of which have been heretofore set out. This abstract was turned over to one E. E. Pierson, an attorney at law in the employ of plaintiff in error for examination, who rendered a written opinion on it holding there was no title, which abstract and opinion were turned over to said plaintiff in error, who, on March 4th, 1912, enclosed the abstract and opinion in a letter to the defendant in error, the letter advising him the title was not merchantable. About that time the parties to the contract had a conversation relative to the title to this land, and defendant in error asked for a little time to try and fix up the title, which plaintiff in error granted him. On March 12th, 1912, plaintiff in error wrote defendant in error advising him that his title was not merchantable, and demanding the return of his money, and again made the same demand in writing on April 15th, 1912. In conversation with defendant in error, plaintiff in error, in the latter part of February, about the first of March, about the middle of March and the 4th or 5th of April, 1912, stated the title was not merchantable, and demanded either a merchantable title or his money back, to which defendant in error replied that he knew the title was not merchantable, but he would try and fix it up, and later admitted he could do nothing to fix the title, and in these conversations when plaintiff in error advised defend-

ant in error that he was ready to close the deal, and offered him the balance of his money if he would give him a merchantable title, defendant in error advised him no tender was necessary as he wanted to try and fix the title first. It is admitted by defendant in error that he never tendered a warranty deed, or deed of any kind to plaintiff in error prior to the commencement of this action, and that plaintiff in error was ready, able and willing to pay the balance of the purchase price on being tendered a warranty deed conveying good title, and an abstract showing merchantable title.

The above is practically all the testimony in the case.

QUESTIONS INVOLVED.

Plaintiff in error assigns error on the rulings of the trial court during the trial; the granting of a new trial to defendant in error, rendering judgment on said new trial in his favor, and taxing costs in his favor; the refusal to grant a new trial to plaintiff in error; and the affirming of the judgment of the trial court by the Supreme Court of the State of South Dakota, and its refusal to grant plaintiff in error a rehearing upon his petition filed therefor, and the following questions are involved in this proceeding:

a. Did the trust patent issued by the United States government to Hin-Tun-Ka-Sau, or Weasel, (Transcript page 25) dated December 12, 1895, for the premises in controversy in Buffalo County, South Dakota confer anything but a possessory title upon said Indian, before the lapse of twenty-five years mentioned therein?

b. If it did not confer anything but a possessory title upon said Indian, did it confer any better title upon the heirs of said Indian?

c. Did it confer a title upon the heirs of said Indian which they could transfer before the lapse of the twenty five years mentioned in said trust patent?

d. Did the County Court of Buffalo County, South Dakota, have jurisdiction to determine the heirs of said Hin-Tun-Ka-Sau, or Weasel, or have any jurisdiction over his estate at all?

e. Did the defendant in error have, and did his abstract show in him a merchantable title, on or about March 1st, 1912?

f. Was defendant in error in a position to, and did he convey by warranty deed properly tendered to plaintiff in error the premises in controversy, to-wit: the South half of Section Twenty-one (21) in Township One hundred Eight (108) North, of Range Seventy-two (72) West, in Buffalo County, South Dakota by a good and merchantable title, it being admitted that plaintiff in error purchased said premises from defendant in error on April 15th, 1911.

g. Is a Federal question involved herein.

ASSIGNMENTS OF ERROR.

And now comes George W. Egan, plaintiff in error herein, by himself as attorney pro sese, and makes and files his assignments of errors:

1. The Circuit Court in and for Minnehaha County, South Dakota erred in granting a new trial to the defendant in said court, Charles S. McDonald, respondent herein, by its order dated April 26th, 1913, filed in the office of the Clerk of the Circuit Court of Minnehaha County, South Dakota on April 30th, 1913, recorded in Judgment Book "28" page 149 for the reason that the evidence in the first trial of the above entitled action showed beyond a reasonable doubt that the title said defendant and respondent, Charles S. McDonald had to the land in controversy in this action, was not good or merchantable, being based upon a patent issued to one Hin-Tun-Ka-Sau, or Weasel, which patent, by its terms conferred only a possessory title in him for a period of twenty-five years, said patent being dated December 12th, 1895, and conferred no title which the said Indian or his heirs could sell or transfer, and for the further reason that the county court of Buffalo County, South Dakota had no jurisdiction to determine the heirship of said alleged heirs of said Indian to whom patent was issued, and could not decree the land in controversy to said alleged heirs, or to any other heirs of said Indian, and had no jurisdiction over said land at all.

2. The Circuit Court in and for Minnehaha County, South Dakota, erred in rendering judgment, dated February 19th, 1914, filed in the office of the clerk of the circuit court of Minnehaha County, South Dakota on February 19th, 1914, and recorded in Book "28" of Judgments, page 445, in favor of the defendant and Respondent, Charles S. McDonald and against the plaintiff and appellant, George W. Egan, for the reason that the testimony in the second trial of said action, and on which the said judgment was based, showed conclusively that the title of said Charles S. McDonald, defendant and respondent, to the land in question was not good and merchantable, said title being derived from an Indian Trust Patent, issued to one Hin-Tun-Ka-Sau, or Weasel, dated December 12th, 1895, on the opening of the portion of the Sioux Indian Reservation in the then territory of Dakota, now state of South Dakota, the Indian to whom the patent was issued being then a tribal Indian, a member of Crow Creek tribe of Sioux Indians. The opening of said reservation was under the provisions of the "general allotment act" being Chap. 119, statutes at large, approved February 8th, 1887. The said patent, by its terms, conferred upon the patentee merely a possessory right of occupancy of said land for a period of twenty-five years from the date of its issuance, and the heirs of said Indian could obtain no better right than said Indian had to whom the patent was issued, and the county court had no jurisdiction to determine the heirship of

said deceased Indian, Hin-Tun-Ka-Sau, or Weasel; no jurisdiction to decree the land to any heirs after determined, and no jurisdiction over the land in any manner.

3. The Circuit Court in and for Minnehaha County, South Dakota erred in holding in its judgment, dated February 19th, 1914, filed in the office of the clerk of said Court February 19th, 1914, recorded in Book "28" of Judgments, page 445, as follows:

"And the Court having considered the evidence herein, and being of the opinion and hereby deciding that the title to the property described in the complaint herein, to-wit: South half (S. ½) of Section Twenty-one (21) in Township One hundred and eight (108) North, of Range Sventy-two (72) West of the Fifth Principal Meridian, situated in the County of Buffalo, in the State of South Dakota, was good and merchantable—" for the reason that the testimony in the case showed that the only title held by the said Charles S. McDonald was through an Indian Trust Patent, issued to one Hin-Tun-Ka-Sau, or Weasel December 12th, 1895, on the opening of the portion of the Sioux Indian Reservation in Dakota, set forth in the act opening the same, being 25 Stat. at Large, 888, approved March 2nd, 1889, said act being passed under the provisions of the "general allotment act" approved February 8th, 1887, said patent, by its terms, retaining title in the government of the United States for a period of twenty-five years, and giving the patentee merely a possessory title, and any heirs of an Indian could get or transfer no better title than what their ancestor had, and for the further reason that a county court would have no jurisdiction either to determine heirship of the alleged heirs of any deceased Indian holding the land under such a patent, or to decree the property, and would have no jurisdiction to decree the land in any manner.

4. The Circuit Court of Minnehaha County, South Dakota, erred in dismissing plaintiff and appellant's cause of action, by its judgment of February 19th, 1914, filed in the office of the clerk of said Court on said date, and recorded in Judgment Book "28" page 445, for the same reasons.

5. The Circuit Court of Minnehaha County, South Dakota, erred in allowing costs to said Charles S. McDonald, defendant and respondent, in said judgment of February 19th, 1914, for the same reasons.

6. The Circuit Court of Minnehaha County, South Dakota, erred in denying motion for a new trial of plaintiff and appellant in the above entitled action, by its order dated April 25th, 1914, and filed in the office of the Clerk of the Circuit Court of Minnehaha County, South Dakota, on May 2nd, 1914, and recorded in Judgment book "28" page 510, for all the foregoing reasons.

7. The Supreme Court of the State of South Dakota erred in affirming the judgment of the Circuit Court of Minnehaha County, South Dakota, in the opinion of Judge S. C. Polley,

filed August 7th, 1915, and holding the title of defendant and respondent Charles S. McDonald, to be good and merchantable, for the reason that the only title which the evidence shows said defendant and respondent had was through an Indian Trust Patent issued to Hin-Hun-Ka-Sau, or Weasel, a tribal Indian, and deeded to the grantor of said Charles S. McDonald by the alleged heirs of the deceased patentee, said patent, by its terms conferring a possessory right on the Indian, reserving the fee title to the United States. That the legal title remained in the United States for a period of twenty-five years after the date of the issuance of the patent, December 12th, 1895, which time had not expired, and the heirs of said Indian could pass no better title than the Indian had, and the County Court of Buffalo County, South Dakota, had no jurisdiction to determine the heirs of the deceased patentee, as that is, by law, reserved to, and under the laws of the United States, said Indians being wards of the United States government, and the county court could not decree the land to the alleged heirs of said Indian, and had no jurisdiction over the land in any manner.

8. The Supreme Court of South Dakota erred in holding in its decision of the above entitled action, in the opinion filed August 7th, 1915, as follows: "From this it follows that respondent was possessed of a merchantable title to the allotment on the first day of March, 1912" (Transcript of record p. 129) for all the foregoing reasons.

9. The Supreme Court of the State of South Dakota erred in denying the motion of plaintiff and appellant for a rehearing, petition for which was duly filed by him, and which was denied by said Court on October 11th, 1915, for all of the reasons hereinbefore set forth.

Wherefore the plaintiff in error prays that the judgment may be reversed.

ARGUMENT.

From the Assignments of Error heretofore set out, it seems to plaintiff in error that seven questions of law, hereinbefore set out in this brief, are involved which will be taken up and discussed in their order.

PROPOSITION I.

The Trust Patent issued to the Indian conferred only a possessory title.

In discussing this proposition I. we desire to first call the attention of the court to the Congressional Legislation enacted, under the authority of which this Trust Patent was issued to Hin-Tun-Ka-Sau, or Weasel on December 12, 1895.

CONGRESSIONAL LEGISLATION.

The legislation of Congress, so far as it pertains to the question at issue herein, is in substance as follows:

The General Indian Appropriation Bill, passed at the first session of the 48th Congress, Chapter 180 of the Acts of that Congress, approved July 4th, 1884, 23 Stat. at Large, 76, on page 96 provides:

"That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States:——— All patents therefore shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the said Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States shall convey the same by patent to the said Indian or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

The more important act, however, known as the "Indian General Allotment Act" passed at the second session of the 48th Congress, known as Chapter 119 of the acts of that Congress, was approved February 8, 1887, and is found in 24 St. L. 388. This act provided generally for the allotment of lands to Indians, and so much of it as pertains to the questions at issue herein, is as follows:

CHAP. 119.

"Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled; that in all cases where any tribe or band of Indians has been, or shall hereinafter be located upon any reservation for their use, either by treaty stipulation or by virtue of Act of Congress or executive order, setting apart the same for their use, the President of the United States be, and he hereby is authorized whenever, in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed or resurveyed, if necessary and to allot the lands in said reservation in severalty, to any Indian located thereon, in quantities as follows:

To each head of a family one quarter of a section.

5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to be issued therefor, in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs, according to the laws of the

State of Territory where such land is located, and that at the expiration of such period, the United States will convey the same by patent to such Indian, or his heirs as aforesaid, in fee, discharged of such trust, and free of all charge or incumbrance whatsoever; *Provided*: that the President of the United States may, in any case, in his discretion, extend the period, and if any conveyance shall be made of the lands set apart, and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. *Provided* That the law of descent and partition in force in the state or territory where such lands are situated, shall apply thereto after patents therefor have been executed and delivered.

6. That upon the completion of said allotments and the patenting of said lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made, shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they reside: and no state shall pass or enforce any law denying such Indian within its jurisdiction, the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made, under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States, who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been, or not, by birth or otherwise a member of any tribe of Indians within the territorial limits of the United States, without in any manner, impairing or otherwise affecting the right of any such Indian to tribal or other property.

Approved February 8, 1887.

This act is known in Indian legislation as the "General Allotment Act", and following this Act, and directly carrying out its intention, and with direct reference thereto, Congress passed an act known as 25 United States Statutes at large, 888, entitled:

"An Act to divide a portion of the Reservation of the Sioux Nation of Indians in Dakota, into separate reservations, and to secure the relinquishment of the Indian title to the remainder, and for other purposes" which act was approved March 2nd, 1889, and is the act referred to in the patent to the land in question, issued to Hin-Tun-Ka-Sau, or Weasel, set out on page 25 of the Transcript of Record.

Section 6 of that act provides for the creation of what was in effect, the Crow Creek Indian reservation. Included in the

lands described in that section is the whole of Township 108, Range 72. Other sections of the act provide in a similar manner for the creation of the Pine Ridge, the Standing Rock, the Cheyenne River and Lower Brule reservations.

Section 8 of the act is, in part, as follows:

Sec. 8. The president is hereby authorized and required whenever in his opinion any reservation of such Indians, or any part thereof, is advantageous for agricultural or grazing purposes, and the progress in civilization of the Indians receiving rations on either or any of said reservations, shall be such as to encourage the belief that an allotment in severalty to such Indians, or any of them, would be for the best interest of said Indians, to cause said reservation, or so much thereof as may be necessary, to be surveyed or resurveyed, and to allot the lands in such reservation in severalty to the Indians located thereon, as aforesaid, in quantities as follows: to each head of a family, three hundred and twenty acres.

Section 11 of the act, which is mentioned in the said Patent to Hin-Tun-Ka-Sau, or Weasel, and under the provisions of which said patent was issued, is as follows:

Sec. 11. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to be issued therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust, and free of all charge and incumbrance whatsoever, and patents shall issue accordingly. And each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of the act approved February eighth, eighteen hundred and eighty-seven, entitled An Act to extend the protection of the laws of the United States and Territories over the Indians and for other purposes; *Provided*, that the President of the United States may in any case, in his discretion, extend the period by a term of not exceeding ten years; and if any lease or conveyance of said lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such lease or conveyance or contract shall be absolutely null and void; *Provided Further*, that the law of descent and partition in force in the State or Territory where the lands may be situated, shall apply thereto after patents therefor, have been executed and delivered. Each of the patents aforesaid shall be recorded in the General

Land Office, and afterward delivered, free of charge, to the allottee entitled thereto."

Under the last entitled act, which provided for allotments to Indians, the Commissioner of Indian Affairs completed a schedule of allotments for the Indians on that portion of the Reservation in which the lands in controversy were located, which schedule of allotments bore date April 9th, 1895, and which was approved by the Secretary of the Interior on August 9th, 1895. Among the Indians residing on the Crow Creek Indian Reservation in what is now the County of Buffalo, State of South Dakota, was one Hin-Tun-Ka-Sau, or Weasel, an Indian to whom was allotted under the provisions of the above two acts, the land in controversy, to-wit: the South half (S½) of Section Twenty-one (21) Township One Hundred Eight (108) North, of Range Seventy-two (72) West.

Hin-Tun-Ka-Sau, or Weasel, received his allotment, and his evidence of title is what is known as a *Trust Patent*, which instrument bore date December 12th, 1895,and was recorded in the office of the Register of Deeds of Buffalo County, S. D. on April 24th, 1909, in Book "9" of Deeds, page 119. Since, if the defendant in error in this case has any title, and since, also, whatever title he had came through Hin-Tun-Ka-Sau or Weasel, and since, too, we have the record of the Trust Patent by which the Indian received whatever title he had from the government, the only way we can tell what kind of title the plaintiff in error received from the Indian is to see what kind of title the Indian received from the government. Hence we propose to place early before the court in this brief and argument, this *Trust Patent*, which we claim, as itself recites, gave nothing to the Indian but a *possessory right of occupancy*, the fee title to remain where it still remains, if our contention be correct, in the United States Government. We respectfully invite a careful persual of the following instrument and its provisions:

"That the United States of America, in consideration of the premises and in accordance with the provisions of the eleventh section of said Act of Congress 2nd March, 1889, hereby declares that *it does and will hold the land thus allotted* (subject to all the restrictions and conditions contained in said eleventh section), *for the period of twenty-five years in trust for the sole benefit of the said Hin-Tun-Ka-Sau, or Weasel, or in case of his decease for the sole use of his heirs according to the laws of the state or territory where such land is located, and at the expiration of said period the United States* will convey the same by patent to said Indian or his heirs, as aforesaid *in fee, discharged from said trust, and free of all charge and incumbrance whatsoever*. Provided, that the President of the United States may, in his discretion, extend the said period by a term not exceeding ten years; and if any lease or conveyance shall be made of said lands, or any contract made touching the same, before

the expiration of the time above mentioned, such lease or conveyance or contract shall be void."

We think that the United States meant what it said in the written instrument above set out, and if so, neither Hin-Tun-Ka-Sau, or Weasel, nor his heirs could alienate or part with that title until the period of limitation had elapsed, which condition and limitation we contend runs with the land and not with the person. Until that limitation had expired no merchantable title could be conveyed by either Weasel or his heirs.

The courts have repeatedly held that these trust patents convey only *possessory title* and the fee title remains in the government. As was well said by Mr. Justice Miller of the United States Supreme Court in the case of the United States vs. Kagama, 118 U. S. 375:

"Following the policy of the European governments in the discovery of America towards the Indians who were found there, the Colonies before the Revolution, and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title to the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples, without the consent of this paramount authority. When a tribe wished to dispose of its land or any part of it, or the state or the United States wished to purchase it, a treaty with the tribe was the only way in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations were equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as Nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far, not brought under the laws of the United States, or of the state within whose limits they resided."

In the case of Beecher v. Weatherby, 95 U. S. 525, the Supreme Court of the United States held:

"But the right which the Indian held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with by the United States."

An interesting case covering this point, and which involved the title to lands which were allotted the same as the land in controversy, to certain Indians in a reservation opened under the provisions of the act of Congress of February 8, 1887, (24 Stat. at L. 389, Chap. 119), is the case of the United States vs.

Rickert 188 U. S. 432, decided by the United States Supreme Court February 23rd, 1903. This is a case where the County Treasurer of Roberts County, South Dakota, was attempting to collect certain taxes levied on improvements on lands allotted to Indians on the Sisseton and Wahpeton Indian Reservation, the Indians holding trust patents to the land the same as the one held by Hin-Tun-Ka-Sau, or Weasel. This is a similar case to the one at bar, and we respectfully call the attention of this Honorable Court particularly thereto:

In that case the Court held:

"A state cannot tax lands allotted to Indians in severalty, under the Act of February 8, 1887 (24 Stat. at L. 389, Chap. 119) the 5th section of which requires the United States to hold such lands in trust for the allottees for twenty-five years, when, unless the time shall be extended by the president, they shall be conveyed free from any charge or incumbrance, and declares that any conveyance thereof, or any contract touching the same before the expiration of such period, shall be absolutely null and void.

"Permanent improvements on lands allotted to Indians in severalty, under the act of February 8, 1887, (24 Stat. at L. 389, Chap. 119) the 5th section of which requires the United States to hold the lands in trust, for the allottees for twenty-five years, and then, unless the time shall be extended by the president, convey the fee, free from any charge or incumbrance, cannot be taxed by the state as personal property."

In its opinion the court said:

"By the Act of Congress of February 8, 1887, Chap. 119, referred to in the certificate, and known as the general allotment act, provision was made for the allotment of lands in severalty to Indians on the various reservations, and for extending the protection of the laws of the United States and territories over the Indians. To that end, the president was authorized, whenever in his opinion a reservation, or any part thereof, was advantageous for agricultural or grazing purposes, to cause it or any part thereof to be surveyed, or resurveyed if necessary, and to allot the lands in the reservation in severalty to any Indians located thereon, in quantities specified in the statute—the allotments to be made by special agents appointed for that purpose, and by agents in charge of the special reservation on which the allotments were made, 24 Stat. at L 388, 389, 390.

"What interest, if any, did the Indian allottee acquire to the land allotted to him? That question is answered by the 5th section of the allotment act, which provides: 'That upon the approval of the allotments provided for in the Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land allotted, for the period of twenty-five years, in trust,

for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of the said period the United States will convey the same by patent to the said Indian or his heirs as aforesaid, in fee, discharged of said trust, and free of all charge or encumbrance whatsoever. Provided that the President of the United States in any case, may in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted, as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. Provided, that the law of descent and partition in force in the State or Territory where such lands are situated, shall apply thereto after patents therefor have been executed or delivered, except as herein otherwise provided****24 Stat. at L. 389, Chap. 119.

The word 'patents' when it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The 'patents' here referred to (although the word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years, the United States would hold the land allotted, in trust for the sole use and benefi of the allottee, or, in case of his death, of his heirs, and subsequently at the expiration of such period,—unless the time was extended by the President—convey the fee, discharged of the trust free of all charge or incumbrance. *In other words, the United States retained the legal title, giving the Indian allottee a paper or writing improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he should be entitled to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration of the statute that any conveyance of the land, or any contract touching the same, while the United States held the title in trust should be absolutely null and void.* So that the United States retained is hold on the land allotted for the period of twenty-five years after the allotment, and as much longer as the president, in his discretion, should determine.

"The Bill, as appears from the certificate of the judges, shows the lands in question were allotted 'under the provisions of the agreement of December 12th, 1889, as ratified by the Act of March 3rd, 1891, and more particularly under the general allotment act approved February 8th, 1887.' Upon inspection of that agreement, we find nothing that indicates any different relations to the United States of the allotted lands from that created or recognized by the act of 1887. On the contrary the

agreement contemplates that patents shall issue for the lands allotted under it 'upon the same terms and conditions and limitations as is provided in No. 5 of the Act of Congress approved February 8th, 1887.' 26 Stat. at L. 1035, 1038, Art. 4."

In the case of Beck v. Flournoy Live Stock & Real Estate Co. 65 Fed. page 30, Justice Thayer, in discussing the powers of Indians to sell or lease their allotted lands, said:

"It is manifest, we think, from an inspection of the various acts to which reference has been made above, that Congress did not intend to authorize, and has not in fact authorized, the members of Indian tribes to whom allotments have been made in severalty, under the acts of February 21, 1863, and the Act of February 8, 1887, to lease or otherwise dispose of their right to use and occupy the lands allotted to them****These limitations on the powers of the Indians to sell or make contracts respecting lands that might be set apart to them for their individual use and benefit were imposed to protect them from the greed and superior intelligence of the white man. Congress well knew, if the wards of the nation were placed in possession of real estate and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several holdings, and instead of adopting the customs and habits of civilized life, and become self supporting, they would speedily waste their substance, and very likely become paupers. The motive that actuated the lawmaker in depriving the Indians of the power of alienation, is so obvious, and the language of the statute in their behalf is so plain, as to leave no room for doubt that Congress intended to put it beyond the power of white men to secure any interest whatever in the lands situated within Indian reservations that might be allotted to Indians."

In the case of Williams v. Steinmetz (Okla.) 82 Pac. 986, the Supreme Court of Oklahoma, referring to the title held by Indians under trust patents to lands allotted to them, said:

"It will be seen that the title to those lands shall be held in trust for the allottees for a period of twenty-five years, in the manner and to the extent provided for in the Act of Congress referred to in the section just quoted, which is 24 Stat. 389, c 119, No. 5, which says 'That upon the approval of the allotments provided for in this act, by the Secretary of the Interior, he shall cause patents to be issued therefor, in the name of the allottees, which patents shall be of the legal effct and declare that the United States does and will hold the lands thus allotted, for the period of twenty-five years in trust, for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of the said period, the United States will convey the same by patent to said Indian, or his heirs as afore-

said, in fee, discharged of said trust, and free of all charge or incumbrance whatsoever. Provided; that the President of the United States may in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such *conveyance or contract shall be absolutely null and void. The making of the lease in* question was plainly a violation of the statute. It was a 'contract made touching the land' and 'conveying the same' within the spirit of the law, and therefor null and void."

The Supreme Court of South Dakota, in the case of Minder, Sheriff, vs. First National Bank of Sisseton, S. D. decided Feb. 5, 1908, and reported in 114 Northwestern Reporter, page 1094 held:

"Members of the Sisseton band of Sioux Indians allowed to take lands in severalty under the contract between them, and the United States are still wards of the government, which had the right to impose such terms and conditions as to the proceeds of the sale of the lands as it might deem proper, and most conducive to the welfare of the Indians."

"Their (Indian) title is a perpetual right of possession and occupancy, the fee remaining in the United States or in the state where the land is situated, as successor to the rights of the European discoverers" Cyc. Vol. 22, page 123, and cases there cited.

"A white man cannot acquire any title from Indians by purchase."

Cyc. Vol. 22, page 127;
Turner v. Gilliland, (Ind. Terr.) 76 S. W. 253.
Hockett v. Alston, 58 S. W. 675.
Case v. Hall, 46 S. W. 180.

"Where tribal Indians have been assigned lands and reservations as places of domicile, they have no vested rights therein, but simply a right to occupy at the will of the government." Lone Wolf v. Hitchcock 187 U. S. 553.

In the case of Nelson v. John, 86 Pac. 933, the Supreme Court of Washington held:

"Restrictions placed by act of Congress upon the alienation by Indians of lands allotted to them in severalty, and embodied in the patents for such lands, are pursuant to a general and beneficent policy of the government for the protection of the the Indians, and *are valid.*

"Restrictions upon alienation contained in the patents issued to Indian allottees of lands in severalty, as required by Acts of Congress, were not repealed by Act of 1887, 24 Stat. 388, c. 119, conferring citizenship on such Indians, and making them subject to the state in which they reside."

The same Court, in a later and recent case, Starr v. Long Jim, 100 Pac., 194, said:

"An agreement between the United States and Indian chiefs providing for the allotment of land to Indians in the possession and ownership of which they should be guaranteed and protected, was ratified by Act. Cong. July 4, 1884, c. 180, 23 Stat. 79; providing that the Secretary of the Interior should cause the quantity of land stipulated in the agreement to be allowed the Indians, which, when selected, should be held for their exclusive use and occupation. Act. Cong. March 3, 1905, c. 1479, 33 Stat. 1048, authorized the issuance of patents to Indians for the lands previously allotted. Held: that under the agreement and the Act of 1884, when considered in connection with the Act of 1905, the Indians to whom the lands were allotted acquired a mere right of possession and the legal title remained in the United States until after patent, and an Indian allottee was without authority to convey the land or divest himself of the ownership and possession thereof before the issuance of the patent."

The Supreme Court of South Dakota in Colombe v. Wilson, 135 N. W. 668, decided April 2nd, 1912, held that *since a contract to convey land which the United States holds in trust for him is absolutely void,* he need not return any consideration received by him, in order, after securing his final patent, to obtain a decree adjudging that the other parties to the contract have no interest in the land; the rule which requires a return of the consideration only applying where a part of the contract is legal.

The Indians still are the wards of the government:

Bowling v. United States, 34 S. Ct. 659.
Felix v. Yaksum (Wash.) 137 Pac. 1037.
Marchie Tiger v. Western Investment Co., 221 U. S. 286.

And the granting of citizenship to them does not operate to remove the restrictions placed upon them:

Nelson v. John, (Wash.) 86 Pac. 933.
Frazee v. Spokane Co., (Wash.) 69 Pac. 779.
Bowling v. United States, 34 Sup. Ct. 659.
United States v. Sandoval, 34 S. Ct. 1, 231 U. S. 28.
United States v. Allen, (U. S. C. C. A. Okla) 179 Fed. 13.
United States v. Gardner, 189 Fed. 690.

We think the citation of further authorities unnecessary to show that the title held by Indians to the land allotted to them is merely possessory, the fee of which is in the United States, and, being merely a possessory title, it was inalienable. The reason why a possessory title only was given to the Indians is obvious after reading the authorities heretofore cited. The Indians, at the time of the passage of the "general allotment

act" as it is generally called, on February 8th, 1887, were, and still are, the wards of the government, whom the government looks out for, to prevent their selling their lands at an inadequate or merely nominal price, and thus becoming pauperized by the white men's greed and rapacity, and for that reason these provisions were made and inserted in all these patents issued to the Indians. That provision that the land allotted to Hin-Tun-Ka-Sau, or Weasel, should be inalienable for twenty-five years, was put in the patent issued to him, can be readily ascertained by an inspection of the copy of the patent which is set forth on page 25 of the transcript of record, and to which we have already called the court's attention. What language can be plainer than that contained in that patent? The patent is dated December 12th, 1895, and under the plain wording of the patent, the time in which the land could be not alienated by Weasel would not expire until 1920.

PROPOSITION II.

The land described in the patent issued to Weasel could not be disposed of or leased by his heirs prior to the termination of the time limit therein.

The testimony in the case shows that Weasel died, and that his estate was probated in Buffalo County, South Dakota, in the year 1908, the Final Decree of Distribution being made on October 12th of that year. The deed from the purported heirs of Hin-Tun-Ka-Sau, or Weasel, was signed and acknowledged October 9th, 1908. Then the question arises, Can the heirs of Weasel give a good title, if Weasel could not? We think it will be conceded that Weasel, had he lived, could not have given good title to this land before the expiration of twenty-five years. Plaintiff in error contends that the heirs could give no better title than Weasel could have given, had he lived. The restriction on alienation was *not merely personal to Weasel, but ran with the land*, being embodied in the instrument upon which the title was based. That is the reasonable rule, and is the law.

Jackson v. Thompson, (Wash.) 80 Pac. 454.
Bowling v. United States, 191 Fed. 19.
Goodrum v. Buffalo, 162 Fed. 817.
Bird v. Winyer, (Wash.) 64 Pac. 178.

We have carefully examined all the above cited cases, and in each of them the statute under the authority of which the patent was issued, and the recitals in the patent, are the same as in the case at bar. In the case of Goodrum v. Buffalo, supra, the Circuit Court of Appeals for the Eastern District of Oklahoma said:

"The language of the act and patent could not have been more exact and clear, to express the purpose and policy of the government to deny the power and right of these allottees to

dispose of the lands in any manner until after the stated period of 25 years. As the greater includes the lesser, no contract, agreement or obligation in form entered into by the allottees OR HIS HEIRS within the limitation period could possibly have the effect to operate as, or result in, a transfer of the title to these lands."

The case of Jackson v. Thompson, supra is a case in point: In that case the Supreme Court of Washington held:

"A restriction on alienation in a deed of the United States to the Indian wards, pursuant to the treaty stipulation made between the government and the Indians, is valid.

"A deed by the United States to an Indian ward forbidding alienation deprives the grantee of the power to dispose of the property by will."

In its opinion the court said:

"It is the contention of the respondents that the language of the patent is conclusive that the estate was a fee simple, with a limitation upon the alienation only during the lifetime of the paentee; that the limitation was purely personal, and did not run with the land; and it is contended that the granting clause, standing alone, would undoubtedly convey a fee-simple estate as an estate of inheritance, but that, in any event, the habendum strengthens the granting clause, viz: the words 'To have and to hold the said tract of land with the appurtenances unto the said Kuds-Cha-ons, or John Puyallup, as the head of the family aforesaid, and to his heirs forever" and that he therefore had, by the habendum, a fee-simple estate. But the respondents do not quote all of the habendum clause. In fact, the very portion, viz: the words added onto the word 'Forever'—with the stipulation aforesaid—are the words which make the controversy in this case, for the expression 'with the stipulation aforesaid' has reference undoubtedly to the stipulation in the granting clause 'that the said tracts shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale or forfeiture, which shall continue, etc.' "

In its opinion the court further said:

"The Indians are wards of the government. These arrangements and provisions are provisions in their interest and by their consent, as indicated in the solemn treaties executed. The government, from the necessities of the case, in consideration of the inexperience of the Indians, was compelled to insert these provisions in deeds, which it issued to them, *to prevent them from becoming the prey of sharpers and speculators,* who would, for an *insufficient consideration,* obtain their lands, the ultimate result being that the Indians would become pensioners on the government: and the mutual interests of the Indians and the government demanded some such regulations. It was certainly within the power of the government to place any restric-

tions on the deeds which it issued to the Indians, which it saw fit. It is insisted by the respondents, as an argument against the continued restriction, that, as the heirs of the Indians increase, the restrictions would become burdensome and impractical; but this is a condition which is within the power of the general government to relieve whenever the necessity arises."

The case last above cited, Jackson v. Thompson, supra, is a recent case, having been decided by the Supreme Court of Washington April 13th, 1905. The case is squarely in point with the case at bar, and we call the attention of this Honorable Court especially to it. The same question involved in the case of Jackson v. Thompson, supra, was passed upon by the same court in an earlier case—Bird v. Winyer, 64 Pac. 178, and in the said case of Jackson v. Thompson the Washington Supreme Court cites the earlier case with approval. In the case of Bird v. Winyer the court held that nothing passed by the patent issued to the Indian by the Government except the right of possession and occupancy of the land described; that the absolute fee remained in the government, and hence, upon the death of the wife of the Indian to whom the patent was issued, no rights could pass by inheritance to the children of the wife by a former marriage. In the course of its opinion in the said case of Bird v. Winyer, the court said:

"So that it is clear that the grantees under the patent obtained only the possession and right of occupancy of the lands described. There was simply a defeasible title conveyed, and that is the condition of the estate at the present time. When Mary Bird died, (in that case it was claimed that the heirs of Mary Bird by a former husband were entitled to the land) no greater estate was created thereby, and the only remaining member of the family might at any time forfeit all right to the possession by failure to occupy and till a portion of the lands, or by roving from place to place. Admitting therefor, that Mary Bird took an equal interest with George Bird (her last husband) at the date of the patent, *she took only the right to occupy and till the premises while the family lived upon the same. At any event, at her death, she left no greater interest than the right of her heirs to occupy and till the premises.* These heirs, not being members of the family, took no interest in the estate."

The Supreme Court of the United States, in the case of Bowling v. United States, 34 Sup. Ct. 659, decided in 1914, held:

"Land, whether in the hands of an Indian allottee, *or his heirs*, is bound by the restrictions in Act, March 2, 1889, forbidding alienation for 25 years from the issuance of the patent."

We wish to call the court's particular attention to the above cited case, and respectfully ask that it be carefully examined.

We fail to see how the purported approval of the Secretary of the Interior to the deed from the purported heirs of Hin-Tun-

Ka-Sau, or Weasel, to R. J. Huston, being Exhibit "C" (Transcript of Record pp. 73-74) attached to the abstract of title, Exhibit "2" of defendant and respondent below, defendant in error here, can be of any effect, the approval being dated March 2nd, 1909, and the deed from the purported heirs of Weasel being dated October 9th, 1908. Plaintiff in error earnestly contends that such approval was of no force or effect, and not based upon any statutory authority. Further than this, the general allotment act of February 8, 1887, while it imposed the restriction on alienation for said period of twenty-five years, did not provide that the president or any one else could shorten the term, or change it, although it provided that the president could, in his discretion, lengthen the term. That was the restriction imposed in the patent, and the Indian took it with that understanding, and by acepting it, he acquiesced in its provisions, completing a contract, as it were.

PROPOSITION III.

The County Court of Buffalo County had no jurisdiction to determine the heirship of the Indian.

We contend that the determination of Indian heirship of allotted lands was and is a matter *within Federal authority exclusively,* and the adjudication of the County Court of Buffalo County, South Dakota was without any validity or force whatever. Under Act of Congress, 1894, 28 St. L. 286, covering this period, 1894 to 1910, all questions of heirship or right of possession to these lands was within the exclusive jurisdiction of the United States circuit courts. This is very clear from the broad language of that 1894 Act, and it has been so held by the Supreme Court in the case of McKay v. Kalyton, 204 U. S. 458; 51 L. Ed. 566, 27 Sup. C. Rep. 343. This case originated in the state circuit court of Oregon, where the daughter of the allottee "as his sole heir" sought to have "her status as legal heir of the deceased, adjudged by a court of competent jurisdiction", and to obtain possession of the allotment, and the trial court held her "to be an illegitimate child of the deceased, and to have no right, title or interest in or to the land in question", and dismissed her action. On appeal to the Supreme Court of the state, the judgment was reversed, 74 Pac. 491. Upon rehearing, it was contended that the state court was without jurisdiction, and that there was a Federal question involved. This the state court decided, and overruled the application for a rehearing: 78 Pac. 332. It was then taken to the Supreme Court of the United States and there reversed on the ground that jurisdiction of all of these questions respecting allotments was then in the Federal circuit courts.

Then Justice, afterwards Chief Justice, White, after referring to prior legislation and decisions of the court, said:

"It results, therefore, that the Act of Congress of 1894, which delegated to the courts of the United States the power to determine such questions, cannot be construed as having conferred upon the state courts the authority to pass upon Federal questions over which, prior to the act of 1894, no court had any authority. The purpose of the Act of 1894, to continue the exclusive Federal control over the subject is manifested by the provision of that Act which commands that a judgment or decree rendered in any such controversy shall be certified by the court to the Secretary of the Interior. By this provision, as pointed out in the Smith case, *supra,* the United Staes consented to submit its interest in the trust estate and future control of its conduct concerning the same to the result of the decree of the Courts of the United States— a power which such courts could alone exercise by virtue of the consent given by that Act. The subsequent legislation of Congress, instead of exhibiting a departure from this policy, confirms it."

In further illustration of this exclusive jurisdiction in the Federal courts, we call attention to an heirship adjudication by Judge Bellinger of the Federal Court of Oregon, in the case of Parr v. Colfax, 132 Fed. 1004, which was a "suit by Indians to recover an interest in allotted lands" and the question of the jurisdiction of the Federal and State courts arose "on demurrer to the bill". After referring to this 1894 Act, as amended February 6th, 1901, he concluded as follows: "There can be no proceeding of the character in question other than that provided by the acts of Congress referred to. The jurisdiction conferred by those Acts is exclusive in courts of the United States. The demurrer is overruled.

The defendants then answered and among other defenses was that of an adjudication of the issue by the state court, which was pleaded as an estoppel, so the question of the jurisdiction of the state courts to pass upon the question involved was presented from another angle, and this time, Federal Judge Wolverton, former Chief Justice of Oregon, referring to the issue said, that: "has been decided by the Supreme Court of the United States, and it was there considered that the state court is without jurisdiction to determine heirship, under Act March 5, 1885, Chap. 319, 23 St. 34, under which the allotments were made to the Indians on the Umatilla reservation. The court held that, prior to the Act of Congress of 1894, *all controversies* necessarily involving the determination of the title, and incidentally the right of possession, of Indian allotments, while they were held in trust by the United States, were not primarily cognizable by any court, either State or Federal, and that the result of the Act of Congress which delegated to the courts of the United States the power to determine such questions, cannot be construed *as having conferred upon the state courts the authority to pass upon Federal questions* over which, prior to

the Act of 1894, no court had any authority. Hence it was determined, as previously indicated, that the state courts had *no authority in that case to adjudicate touching the heirship as it respects Indian allotments.* The case is preclusive, therefore, of any further controversies on the question in this case, and it is plain that the plea cannot operate as an estoppel to the present suit." It is to be remembered that this was a collatoral attack on the judgment, and, if it had not been void it could not have been assailed in this way.

There was an appeal taken, but it was dismissed, Parr v. Colfax, 117 C. C. A. 48, for want of jurisdiction, because a few days after the decree below was rendered, Congress by the Act of June, 1910, 36 St. L. 855, repealed the statute conferring jurisdiction on the Federal courts to determine heirship in these allotment matters, and vested the authority with the Department of the Interior.

While these cases involved land on a particular reservation, they decided beyond question, it seems to us, where the power was lodged to determine the only question here involved, that of heirship in such cases, and, in view of the statute and its construction, this court must, as the Federal courts have, hold that these judgments of the State County and Circuit Courts, brought upon that record and abstracted, present nothing that is entitled to any legal consideration and respect whatever.

There is another ground of Federal jurisdiction. As it is not shown by any evidence that can be recognized, or that has any legal validity, that the trust patentee is dead, or, if he is, that these three are all his heirs. Whatever interest there may be out is still in the United States, and it would be a necessary party, and the state court would have no jurisdiction over the general government.

From the letter of the trial Judge written on his granting a new trial to defendant in error, which letter is set out in the brief of defendant and respondent below, defendant in error here, and appears in transcript of record, pages 103-104, his decision appears to have been based on the "decree of the county court of Buffalo County, and United States v. Park Land Co. 188 Federal, 383, and United States Fidelity & Guaranty Co. (Oklahoma) 129 Pac. 60. The Federal case referred to does not disclose what the facts were, merely construed some special legislation for Minnesota, and was the mere oral expressions of a trial judge to counsel on a motion. It seems to have been an action by the government against some timber land trespassers.

The other case was rightly decided because the territorial probate court was there "the proper court" within, as the court properly says, "the plain language of the statute" of 1902, to appoint a guardian of a minor.

The state courts seems to have been singularly unfortunate with these questions: On the subject of rights with reference to allotments we have found only two cases that have gone to the Supreme Court of the United States, and the Supreme Courts of the states were reversed in both: Oregon in the case of McKay v. Kalyton, 204 U. S. 458, 27 S. C. Rep. 343, to which we have referred, and Oklahoma in the case of Tiger v. Western R. Co. 221 U. S. 286, 55 L. Ed. 736; 31 S. C. Rep. 578.

In view of the foregoing, we contend that under the laws of the United States, plaintiff in error was entitled to have an abstract furnished to him by defendant in error, showing a Federal decree of heirship, or evidence from Federal authority, not a mere "decree of the county court of Buffalo County," as held by the trial judge.

PROPOSITION IV.

No good and sufficient Warranty Deed was ever tendered by defendant in error to plaintiff in error for premises in controversy in accordance with the provisions of contract for sale thereof entered into between the parties on April 15, 1911.

On April 15th, 1911, plaintiff in error, George W. Egan and defendant in error, Charles S. McDonald entered into a contract of sale for the premises in controversy, which contract was in writing, marked Exhibit "E" (Tr. 15) was admitted in evidence on the trial. Despite the recitals in the contract, it is undisputed that $1,000.00 in cash was paid at the time the contract was executed. In said contract (Tr. 15) it is recited:

"Three thousand dollars ($3,000.00) to be paid on or before the first day of March, 1912. *Abstract showing good, merchantable title to be furnished, and a good, sufficient Warranty Deed to be delivered when payment of* $3,000.00 *is made.* Settlement to be made at Sioux Falls Sav. Bk."

Defendant in error, Charles S. McDonald never made a tender of a good and sufficient warranty deed or any deed to the plaintiff at any time and so testified on the trial of the case in the trial court (Tr. top page 11) and did not tender one on March 1st, 1912, the time fixed for the closing of the deal by the contract, Exhibit "E" (Tr. 15) although plaintiff in error advised defendant in error about February 25th, 1912, (Test. of Geo. W. Egan, Tr. p. 12, f. 18) that he had mortgaged some Iowa land, and was ready to turn over the balance of the money to defendant, McDonald, when he had furnished a merchantable title, which testimony is undisputed. Again, after plaintiff in error had his conversation with said McDonald about February 25th, 1912, he had a further talk with him in which he again advised him, (McDonald) that he was ready to close up the deal, but McDonald asked for a little more time in which to fix up the title and said "You give me a little time to fix it

up: I want to have Harry Judge write down to Washington. He said he would write down to see if he could fix the title up" (Test. of Geo. W. Egan, Tr. p. 12, f. 18). On being advised by Plaintiff in error, Geo. W. Egan in that conversation that he (Egan) was ready to close the deal, he replied "You don't need to bother about getting the money ready now because there is a defect in the title, and I have got to fix that up first" (Tr. p. 12, f. 18). The testimony also shows that a short time after the second conversation Mr. Egan, this plaintiff in error had a third conversation about the 12th or 15th of March, 1912, in which he again asked about the abstract, and again advised Mr. McDonald that he was ready and anxious to close this deal, and again about the 1st to 5th of April, 1912, another conversation was had between Egan and McDonald, at Mr. Egan's office in Sioux Falls, So. Dak., at which the question of title was again gone into, Mr. Egan saying to Mr. McDonald, "Mac, aren't you ever going to furnish me a merchantable title to that land?" to which defendant in error, McDonald replied: "I don't know what to do. I cannot fix it up." Plaintiff then stated to defendant, McDonald that he had had one thousand dollars of his (Egan's) money since April 15th, 1911, and never furnished him any title and admitted he hadn't any (Test. of Geo. W. Egan, tr. p. 13 f. 19-20). It is not disputed that plaintiff in error made several demands upon the defendant in error for this money, the last one being about a week before the suit was commenced, suit being commenced on June 18th, 1912. (Tr. p. 16 f. 26-27). The evidence also shows that plaintiff in error made a written demand upon defendant in error McDonald on March 12th, 1912, which said McDonald admitted receiving. (Tr. p. 11 f. 15 and 16).

It is difficult to see how plaintiff in error could have done more. He did everything in his power to comply with and carry out his part of the contract. The testimony shows that he had gone to considerable trouble to have the balance of the money, $3,000.00 ready on March 1st, 1912, and was, on that date, ready, able and willing to comply with his part of the contract. On April 15th, 1911, plaintiff in error paid to defendant in error One Thousand Dollars, which money defendant in error has never returned. On March 1st, 1912, the date when the deal should have been closed according to the contract, and several times after that date, demands were by plaintiff in error either for the perfection of the title or the return of the money, neither of which requests were complied with. Finally, plaintiff in error brought suit.

The contract between plaintiff in error and defendant in error provided that the defendant should show a "merchantable title", but even where there is no such strong, express obligation as to the character of the title to be furnished, the law of South Dakota, as well as every other state provides that the

title must be free from reasonable doubt. Black H. N. B. v. Kellogg, 4 S. D. 312; Godfrey v. Bram, 27 S. D. 218, 130 N. W. 442.

An abstract of title "is a statement in substance of what appears in a public record affecting the title of property agreed to be conveyed, and also a statement in substance of such facts as do not appear upon the public records which are necessary to perfect title." Wright v. Bott, 163 S. W. 360, and authorities cited. See also, Heinsen v. Lamb, 7 N. E. 77.

An abstract, showing good title, necessarily means title deducible from record, not parol or illegal evidence, even if it were possible for him to show title by witnesses.

The very first entry in the abstract furnished by defendant in error to plaintiff in error discloses a *"trust patent"* (Tr. 21-22) and being held to know the law, the purchaser would have notice that the government had even not parted with any title. *There is nothing in the abstract to show that Mr. Huston's grantors were all the adult heirs of the trust patentee, or even that the patentee is dead, or if he were, that even these grantors were in fact his heirs.* One's mere self-serving declaration that he or they are the "sole and only heirs" is no evidence thereof, and the Secretary of the Interior had no authority to pass on heirship till the June 25th, 1910 act. (Tr. pp. 82-83, ff. 174-175) known as the "Burke Law". Under the Act, of May 27, 1902 (Tr. 81-82, ff. 172-173) relied upon by defendant in error, the Secretary is only given power to approve the deed.

It is a well settled rule under such contract as is here involved, that if the abstract furnished does not show a contractual transfer between a prior grantee and a subsequent claimant of the title, that is, a deed from one to the other, and it also fails to show that which would constitute a good transfer of title by the law of the locality where the land is situated, the purchaser may refuse the title, for he will not be put to the hazard of a decision of a question of fact outside of legal record evidence, with an abstract of which, the contract was, he should be furnished before he took the property. Such abstract was a condition precedent to the purchase. Bras v. Harrington, (Cal.) 24 Pac. 787; Taylor v. William, (Col.) 31 Pac. 504, Brown v. Widen, (Ia.) 103 N. W. 158. This rule as to a contractual break in the chain of title has numerous illustrations where there has in fact been a descent cast, and there has been no adjudication of death, heirship and findings of persons who are heirs or devisees.

In support of the general rule to which we have referred, see:

Turner v. McDonald, (Cal.) 18 Pac. 262; 9 Am. St. rep. 189.
Gates v. McWilliams, (Ky.) 6 Dana, 42.
Rozier v. Wright, (Mo.) 48 S. W. 470.
Austin v. Shipman, 141 S. W. 425.

Cerf v. Diener, (N. Y.) 104 N. E. 126.
Wanzer v. DeNise, (N. Y.) 80 N. E. 1088; 117 Am. St. 871.
Foster v. Eoff, (Tex.) 47 S. W. 394.
Coonrad v. Studebaker, (Wash.) 101 Pac. 489.
Watson v. Boyle, 104 Pac. 147.
Colper v. Ludblow, 106 Pac. 634.
Crosby v. Wynkoop, 106 Pac. 175.

PROPOSITION V.

A Federal question is involved in this case.

There is a Federal question involved in this case, and that there may be a review of it by either party, it is necessary that the attention of the court should be called to it, which was fully done, not only in the main brief and argument of plaintiff in error here, appellant below, in the Supreme Court of South Dakota, but was further called to the attention of that court in his additional reply brief and argument (Tr. p. 115 ff. 250-251) and also in his petition for rehearing in that court (Tr. p. 132 ff. 291).

It is provided by the Federal Judiciary Act, U. S. Compt. St. 1901, p. 575 that the Supreme Court of the United States has jurisdiction to review a decision of the court of last resort of a state, which involves the validity or effect of a statute of the United States.

Plaintiff in error, in his main brief and argument in said Supreme Court contended that under the Federal statutes and decisions, the land involved in this case was held in trust by the government because the limitation had not expired; that the trust patentee, Weasel, could not have conveyed a good title, and that being so, his heirs could not, particularly in view of the fact that class of persons was and is mere *wards* of the government, and have only such power to sell or dispose of property given them as is expressly conferred by Congress.

This contention was denied by the defendant in error here, respondent in the court below; it was contended by him that under the statute of 1902, 32 St. L. 275, the "sale by the heirs passed a good title". (Tr. pp. 83-89 ff. 176-191).

This latter contention we denied;

Now, the contention of either side clearly presents and involves the construction and effect of Statutes of the United States, with reference to persons and property that we contend are within the exclusive care and control of the government. A Federal question is therefore involved. 11 Cyc. 928.

CONCLUSION

In view of all the facts in this case, and the law applicable thereto, we hold that plaintiff in error is entitled to have a finding by this court that the defendant in error is not now

and never was possessed of a merchantable title to the South half of Section 21, Township 108, Range 72, West Fifth P. M. Buffalo County, South Dakota, and further that under all the facts in this cast, defendant in error did not comply with his part of the contract in furnishing plaintiff in error a Warranty Deed as provided for in their written memorandum of sale; that the Honorable Trial Court was in error when it entered judgment for the defendant and against the pailntiff in that court, and was also in error in denying plaintiff in that court a new trial upon his showing and motion therefor; that the Supreme Court of South Dakota was in error in affirming the judgment of the lower court, and denying appellant in that court, plaintiff in error here a rehearing in this case upon his petition filed therefor.

And that in all things, the orders, rulings, judgments and findings of the lower courts should be reversed and the case remanded.

Respectfully submitted,

GEORGE W. EGAN,

Attorney pro Sese.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.
No. 88.

GEORGE W. EGAN, PLAINTIFF IN ERROR,

vs

CHARLES S. McDONALD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

Brief and Argument for Defendant in Error

STATEMENT OF THE CASE.

The Plaintiff in error, whom we will refer to as the plaintiff, as he was the plaintiff in the trial court (the Circuit Court of the County of Minnehaha in the State of South Dakota), and the appellant in the Supreme Court of the State of South Dakota, and the defendant in error, whom we will refer to as the defendant, as he was the defendant in the trial court and the respondent in the Supreme Court of the State of South Dakota, made a contract (shown as Exhibit "E" at p. 15 of the Record) by which the defendant agreed to sell to the plaintiff and the plaintiff agreed to buy of the defendant the land situated in the County of Buffalo, in the State of South Dakota, described in the contract. The contract states that the purchase price of the land was $3,000 and that at the time the contract was made the plaintiff paid $200 on account of the purchase price. In fact, the contract price was $4,000 and $1,000 instead of $200 was paid on account by the plaintiff at the time the contract was made. The contract was worded as it was with respect to the sale price and the payment on account by request of the plaintiff (folio 137, at p. 65 of Record). The contract which was made April 15, 1911, provided for the payment of the balance of the purchase price on or before March 1, 1912, and for an abstract showing good

and merchantable title and a good and sufficient warranty deed to be delivered by the defendant when the balance of the contract price was paid. Time was in no way made of the essence of the contract.

On or about March 1, 1912, an abstract of title to the land was submitted by the defendant to the plaintiff. Various objections were made to this abstract by the plaintiff and a few days thereafter and on or about March 8 the defendant furnished to the plaintiff an entirely new abstract. This abstract appears as Exhibit "2" at page 21 of the Record. The objections made by the plaintiff at the time to the title, as shown by the said abstract, appear in Exhibit "B" shown at page 62 of the Record, the same being an opinion by E. E. Pierson, a clerk in the then office of the plaintiff. Previously, and as shown at folio 141 at page 67 of the Record, the defendant had informed the plaintiff that he was ready to settle and had the deed and the defendant did not extend the time of the payment by the plainttiff of the balance of the purchase price. Such balance was never tendered by the plaintiff to the defendant. The plaintiff took the position that the title to the land was not merchantable and he, therefore, declined to perform the contract. Later he brought this action to recover the payment of $1,000 which he had made to the defendant on account of the contract price. The right of the plaintiff to recover this payment depended, of course, upon the character of the title. If the title of the defendant was such as called for by the contract, that is to say a merchantable title, the plaintiff was not entitled to recover the said payment. The trial court held that the title was merchantable and dismissed the action. On appeal taken by the plaintiff to the Supreme Court of the State of South Dakota, that Court affirmed the judgment of the trial court. The plaintiff has brought the action to this Court claiming that a Federal question is involved.

The statements at the lower part of page 7 and the upper part of page 8 of the brief of the plaintiff regarding certain alleged conversations between the plaintiff and the defendant and alleged admissions of the defendant are squarely controverted by the defendant, as will appear by reference to folios 140 and 141 at page 67 of the Record. The subject matters of those statements, however, insofar as they were considered by the Supreme Court of South Dakota were de-

cided adversely to the plaintiff, do not involve a Federal question and do not affect the merits of the case.

ARGUMENT.

THE FEDERAL QUESTION.

The defendant contends that no Federal question is properly before this Court for consideration; that the judgment of the State Court rests on matters of general and state law strong enough to sustain the judgment and that, therefore, this Court should not consider any Federal question which the plaintiff may contend is involved in the case and that the appeal should be dismissed.

The plaintiff, at page 31 of his brief, states his contention that a Federal question is involved in the case as follows: "That under the Federal statutes and decisions, the land involved in this case was held in trust by the Government because the limitation had not expired; that the trust patentee, Weasel, could not have conveyed a good title and that being so, his heirs could not, particularly in view of the fact that that class of persons was and is mere wards of the Government and have only such power to sell or dispose of property given them as is expressly conferred by Congress." That statement is a restatement of the three questions which are stated at page 8 of the brief of the plaintiff as follows:

> "a. Did the trust patent issued by the United States Government to Hin-Tun-Ka-Sau or Weasel (transcript p. 25), dated December 12, 1895, for the premises in controversy in Buffalo County, South Dakota, confer anything but a possessory title upon said Indian before the lapse of twenty-five years mentioned therein?
>
> "b. If it did not confer anything but a possessory title upon said Indian, did it confer any better title upon the heirs of said Indian?
>
> "c. Did it confer a title upon the heirs of said Indian which they could transfer before the lapse of the twenty-five years mentioned in said trust patent?"

It will be remembered that the so-called "Indian General Allotment Act", 24 St. L. 388, Chapter 119 of the Acts of the 48th Congress, was approved February 8, 1887. Thereafter

and at the second session of the 50th Congress, an act was passed and was approved March 2, 1889, which was entitled, "An Act to Divide a Portion of the Reservation of the Sioux Nation of Indians in Dakota into Separate Reservations and to Secure the Relinquishment of the Indian Title to the Remainder and for other purposes." This act is found in 25 St. L. 888. Section 6 of this Act provided for the creation of what was in effect the Crow Creek Indian Reservation. Included in the land described in that section is the land in controversy in this case. Hin-Tun-Ka-Sau or Weasel was an Indian residing on that reservation. The land in question was allotted to him and a trust patent therefor was issued to him under date of December 12, 1895. This patent is shown at page 25 of the Record. The foregoing Congressional legislation is sufficiently fully set forth on pages 12, 13 and 14 of the brief of the plaintiff. The United States, therefore, issued to Hin-Tun-Ka-Sau or Weasel a so-called trust patent for this land in which the United States declared, "that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said Eleventh Section) for the period of twenty-five years in trust for the sole use and benefit of the said Hin-Tun-Ka-Sau or Weasel or in case of his decease, for the sole use of his heirs, according to the laws of the state or territory where such land is located and that at the expiration of said period, the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever, etc." The "Eleventh Section" referred to in the patent was the Eleventh Section of the act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations, etc., approved March 2, 1889, 25 St L. 888, was largely the same as Section 5 of the Indian General Allotment Act and provided that each allottee should be entitled to all the rights and privileges and be subject to all the provisions of Section 6 of that Act. Said 6, among other things provided that every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they reside.

After the issuance of the patent, the allottee, Weasel, died and thereafter a deed of the land, dated October 9, 1908, was

executed by Plays With Iron, Wounded Knee and Mrs. Red Water Number Two to R. J. Huston. This deed, with the exception of the acknowledgement, appears at page 5 of the brief of the plaintiff and is fully set forth on page 73 of the Record. In the deed, the grantors are recited as, "Sole and only heirs of Weasel, deceased, a Crow Creek Sioux Indian". This deed was duly approved by the Secretary of the Interior on March 2, 1909, and was recorded in the land division of the office of Indian Affairs on March 26, 1909. It was later and on April 20, 1909, recorded in the office of the Register of Deeds of Buffalo County, South Dakota.

For some reason, the plaintiff has not seen fit in describing the Congressional legislation pertinent to this case to refer to the Act of Congress under which the sale of this land by the heirs of Weasel was made and their deed was approved by the Secretary of the Interior. We refer to Chapter 888 of the Acts of the 57th Congress, 32 St. L. 245, approved May 27, 1902. Section 7 of that Act, 32 St. L. 275, appears in folio 172 on page 82 of the Record. It is so important, however, that we copy it herewith as follows:

> "Sec. 7. That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All alloted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the state or territory where the same is situated; Provided, That the sale herein provided for shall not apply to the homestead during the life of the father, mother or the minority of any child or children."

That Act, 32 St. L. 275, was not modified or repealed in any way until it was repealed by Chapter 431 of the Acts of the 61st Congress, approved June 25, 1910, 36 St. L. 855, which

provides among other things that when an allottee dies before the expiration of the trust period and before the issuance of a fee simple patent without having made a will disposing of his allotment, the Secretary of the Interior shall ascertain the legal heirs of the decedent. Said Act of May 27, 1902, 32 St. L. 275 was in effect, therefore, at the time the said sale by the heirs of Weasel was made and it was under the provisions of that Act that the sale was made and was approved by the Secretary of the Interior.

The defendant contends that the effect of the Act of May 27, 1902, 32 St. L. 275, was to terminate in all respects, at least as far as the land inself was concerned, the trust period of twenty-five years upon the death of the allottee within that period and a sale of the allotted land also within that period made by his heirs with the approval of the Secretary of the Interior. (The trust may have been transferred to the proceeds of the sale.) That the said Act of May 27, 1902, was constitutional and that Congress had the unquestioned right so to provide for the termination of the trust period has been repeatedly held by this Court. It is sufficient on this point to cite *United States v. Nice*, 241 U. S. 591, *Tiger v. Western Investment Company*, 221 U. S. 286, 315-316 and *United States v. Waller*, 243 U. S. 452.

It is apparent, therefore, that so far as the allottee, Weasel, was concerned, the trust patent gave him for the period of twenty-five years from the date of the issuance of the patent, only what may be termed, to use the language of the plaintiff in his brief, a "possessory title;" that by the patent itself and the laws of the United States under which it was issued in force at that time, no more extensive title was given to his heirs, if he died within the said twenty-five year period, but it is also clearly apparent that under the said Act of May 27, 1902, which date was within the said trust period, if Weasel died during the trust period and his heirs sold the land and such sale was approved by the Secretary of the Interior, the so-called trust, upon such sale and approval, terminated, and the purchaser acquired a full title, "the same as if a final patent without restriction upon the alienation had been issued to the allottee", in other words, a title in fee.

We submit, therefore, that the contention of the plaintiff that there is a Federal question in this case because of his theory that the trust patent issued to Weasel conferred only

a possessory title upon him and his heirs for the period of twenty-five years from the date of the patent and that, therefore, his heirs did not acquire a title of any other character and could not convey a title free from any restriction on alienation, is effectually answered and disposed of by the said Act of May 27, 1902, 32 St. L. 275.

However, the plaintiff contends on page 27 of his brief that there is another ground of Federal jurisdiction and presumably he contends, therefore, that there is another Federal question in the case, though he does not include it among the questions involved in the case, as stated by him on page 8 of his brief. On page 27 of his brief, he says, "As it is not shown by any evidence that can be recognized or that has any legal validity that the trust patentee is dead or if he is that these three are all of his heirs. Whatever interest there may be out is still in the United States and it would be a necessary party and the state court would have no jurisdiction over the general government".

Here again, as at other stages of this litigation in the courts below, the plaintiff indicates that he does not clearly apprehend the character of this action. It is not an action to perfect and quiet the title to the land in question, nor is it an action under the Act of Congress of August 15, 1894, 28 St. L. 286, to determine questions involving the rights of Indians to allotments. Neither the plaintiff nor the defendant is in whole or in part of Indian blood or descent. No other parties are interested in this action. No person who is either in whole or in part of Indian blood or descent is in any way affected by this action. The case of *McKay v. Kalyton*, 204 U. S. 458, which is so strenuously relied upon by the plaintiff, is not pertinent to the issues involved in this action. The case at bar, as shown by the decision of the Supreme Court of the State of South Dakota herein, 36 S. D. 92, 153 N. W. 915, and copied at page 127 of the Record, has been resolved into simply the question whether the title to the land is merchantable. No objection to the want of proper evidence to establish the death of Weasel was made by the plaintiff in the trial court. However, the final decree of distribution of the County Court of Buffalo County, South Dakota, in the matter of the estate of Weasel, whether that Court had jurisdiction over the administration of his estate so far as this allotment is concerned or not, and the recitals in the

deed given by his heirs to Huston, shown at page 73 of the Record, to the effect that they are the "sole and only heirs of Weasel, deceased, a Crow Creek Sioux Indian", and the approval of that deed by the Secretary of the Interior, constitute *prima facie* evidence of death and could only be overcome by some direct evidence that Weasel did not die prior to the time the said deed was executed. The legal presumption, of course, is that the Department of the Interior in approving the deed by the heirs of a deceased allottee has before it some proper evidence not only that the allottee is dead but that the persons named in the deed as his heirs are in fact his heirs.

With reference to this particular question, we also suggest that if there were any merit to it, the plaintiff is estopped from raising it for the reason that he did not include it in the objections to the title furnished by him to the defendant, which objections are contained in the opinion of E. E. Pierson, Exhibit "B", which appears at page 62 of the Record. The rule of law is well established that when a buyer of real property once states his objections to the title, he cannot, after he has become involved in litigation with the seller over the title, raise additional objections.

Furthermore, in opening the discussion of his "Proposition II" on page 22 of his brief the plaintiff states, "The testimony in this case shows that Weasel died."

There is, therefore, no Federal question involved in this feature of the case.

THE MC KAY-KALYTON CASE.

The plaintiff contends that the title to this land is not merchantable because it has never been passed upon by the United States Circuit or District Court for the District of South Dakota, and that it cannot be made merchantable until a proceeding of some character affecting the land has been had in such District Court. His argument to support that contention is based on the case of *McKay v. Kalyton*, 204 U. S. 458. Other cases are cited in support of this contention, but they rest upon the *McKay-Kalyton case* which is one of the leading decisions of this Court with reference to Indian allotments.

It will appear, however, from a careful examination of the case, which was decided in 1907, that it is in no way an authority for the plaintiff in the case at bar and in no way effects

the case at bar.

The case as appears from page 467 of the opinion, was commenced in 1899 and therefore prior to the enactment of said Section 7 of the Act of 1902, 32 St. L. 275, on which, as we have heretofore shown, the title of the defendant in the case at bar is based.

The syllabus in the *McKay-Kalyton Case* is as follows:

"Although the Federal right was first claimed in the State Court in the petittion for rehearing, if the question was raised, was necessarily involved, and was considered and decided adversely by the State Court, this Court has Jurisdiction under §709, Rev. Stat.

"The United States has retained such control over the allottments to Indians that, except as provided by Acts of Congress, controversies involving the determination of title to, and right to possession of, Indian allotments while the same are held in trust by the United States are not primarily cognizable by any Court, State or Federal.

"The Act of August 15, 1894, 28 Stat. 286, delegating to Federal Courts the power to determine questions involving the rights of Indians to allotments did not confer upon State Courts authority to pass upon any questions over which they did not have jurisdiction prior to the passage of such Act, either as to title to the allotment, or the mere possession thereof which is of necessity dependent upon the title."

The said Act which is found in 28 St. L. 305, is as follows:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto, in the proper Circuit Court of the United States. And said Circuit Courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law

> or treaty. And the judgment or decree of any such Court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now held by either of the Five Civilized Tribes nor to any of the lands within the Quapaw Indian Agency; Provided, That the right of appeal shall be allowed to either party as in other cases."

Three points were, therefore, decided in that case. The first point is merely a question of practice. The second point (the holding in the second paragraph of the syllabus) is not pertinent to the case at bar because no controversy involving the determination of the title to and right of possession of the allotment to Hin-Tun-Ka-Sau or Weasel arose while the allotment was held in trust by the United States. *In fact, a controversy of that character has never arisen.* Under the Act more particularly construed in the *McKay-Kalyton Case*, the Act of Congress of August 15, 1894, Ch. 290, 28 St. L. 286, described at page 467 of the opinion, provision was made for the maintaining of an action in the Circuit Court of the United States by any person in whole of in part of Indian blood or descent to determine his right to or in the allotment. In the case at bar, that of Egan v. McDonald, the right of any person who is in whole or in part of Indian blood or descent to the Weazel allotment is not involved and never has been questioned. No controversy affecting the right to the possession or ownership of the land so far as any of the heirs of Weazel are concerned has arisen.

The Act of Congress of 1902, 32 St. L. 275, above referred to, under the provisions of Section 7 of which Act the title to the land of the defendant in the case at bar was derived, was not in force when the *McKay-Kalyton* controversy arose and therefore the heirs of the allottee, Kalyton, were unauthorized to sell the land which had been allotted to him and the United States was compelled to continue to hold the land in trust until the expiration of the twenty-five year period provided for in the trust patent issued to Kalyton.

Congress in enacting said Section 7, 32 St. L. 275, in 1902 provided for the abrogation so far as the land itself was concerned, of the trust created by former legislation and men-

tioned in the patent to Weasel, the termination of such trust to become effective at such time as the heirs of Weasel might see fit to sell the alloted land with the approval of the Secretary of the Interior. This could not have been done in the *McKay-Kalyton Case* as when that case arose there was no law in force providing for such a sale. The trust may have and presumably did, conformably to the Rules and Regulations of the Department of the Interior continue as to the proceeds of the sale. This appears from *United States v. Thurston*, 143 Fed. 287, and *National Bank of Commerce v. Anderson*, 147 Fed. 87, in which cases sales had been made under the said Act of 1902, 32 St. L. 275.

It may possibly be that under the Act of Congress of August 15, 1894, 28 St. L. 286, construed in the *McKay-Kalyton Case*, an heir of Weasel other than the three heirs who executed the deed to Huston (if there were such an heir) could maintain suit in the United States District Court to recover his share of the allotment. But that is not material. The intestate of such an heir, that is to say Weasel, the allottee, was, at the time of his death, a citizen of the State of South Dakota and a resident of the County of Buffalo therein. The County Court of that county therefore had undoubted jurisdiction to administer his estate, at least other than the said allotment, and to determine, at least in the first instance, (which determination would stand unless reversed) his heirs. This that Court did, and the deed made by such heirs was approved by the Secretary of the Interior as provided by Section 7 of said Act of 1902, 32 St. L. 275. The heirs of Weasel were also citizens of South Dakota and were as much bound by the said decree of the County Court of the County of Buffalo finding heirship as they would be bound if they were of whole white blood.

Said Section 7 of the Act of Congress of 1902, 32 St. L. 275, clearly provides that the sale of the allotment by the heirs of the deceased allottee with the approval of the Secretary of Interior shall end the trust period forthwith and pass an absolute title in fee. If said Section 7 had never been enacted the case of *McKay v. Kalyton* would apply to any controversy regarding an allotment of the character described in the Act of August 15, 1894, 28 St. L. 286-305 (copied at page 467 of the opinion in that case.) The case at bar of Egan vs. McDonald, however, is not such a case. No such case has

arisen.

As suggested above, the case of *McKay v. Kalyton* must now be read and applied in the light of the subsequent legislation of Congress, particularly said Section 7 of the Act of 1902, 32 St. L. 275, which was in no way involved or considered in that case.

What has been said above with reference to this case *(McKay v. Kalyton)* applies as well to the third paragraph of the syllabus in the case above quoted. That case applies only to allotted lands to which the United States still holds the title in trust. When the land is sold by the heirs of the deceased allottee with the approval of the Secretary of the Interior, as provided by said Section 7, 32 St. L. 275, the trust is terminated because the title so conveyed is "a full title" (that is to say a title in fee) and "without restriction upon alienation."

The statute involved in the *McKay-Kalyton Case*, 28 St. L. 286, 305, was amended by Chapter 217 of the Acts of the 56th Congress, approved February 6, 1901, 31 St. L. 760. This amendment did not change the amended statute in any way so far as the questions under consideration are concerned. The amendment was made, it will be noted, prior to the enactment of the statute, 32 St. L. 275, under which the sale of the land in question was made by the heirs with the approval of the Secretary of the Interior.

Furthermore, the *McKay-Kalyton Case* is in no way pertinent to the case at bar because, as shown by this Court in the case of *Hallowell v. Commons*, 239 U. S. 506, the Federal District Courts since the passage of the Act of June 25, 1910, 36 St. L. 855, above referred to, no longer have jurisdiction to determine the heirs of deceased allottees as the said Act of June 25, 1910, vested exclusive jurisdiction in the Secretary of the Interior to ascertain such heirs. The said Act of June 25, 1910, therefore, in effect repealed the Act of August 15, 1894, 28 St. L. 286, which was involved in the *McKay-Kalyton Case*, and the amending Act of February 6, 1901, 31 St. L. 760.

If any controversy had arisen between the heirs of Weasel prior to the enactment of the statute of June 25, 1910, 36 St. L. 855, with respect to their interests in the allotment in question, such controversy would have had to be determined in the then Circuit Court of the United State for the District of South Dakota, but no such controversy rose during that

period and prior to the enactment of the said statute of June 25, 1910, Congress saw fit to enact the statute of May 27, 1902, 32 St. L. 275, more particularly involved in the case at bar. That statute was probably repealed by the said Act of June 25, 1910, but prior to such repeal and while the statute was in full force and effect, the sale in question by the heirs of Weasel was made to Huston and was approved by the Secretary of the Interior on March 2, 1909.

That the Federal Courts have recognized the fact that under the provisions of said Section 7 of the Act involved in this case, 32 St. L. 275, lands inherited from Indian allottees may be conveyed by the heirs in fee subject to the approval of the Secretary of Interior will clearly appear from a careful reading of the following cases among others, *United States v. Thurston*, 143 Fed. 287, *National Bank of Commerce v. Anderson*, 147 Fed. 87, *United States v. Leslie*, 167 Fed. 670, (a case arising in South Dakota, the decision in which was by Judge John E. Carland), *United States v. Bellm*, 182 Fed. 161, and *United States v. Comet Oil & Gas Co.* 187 Fed. 674.

THE DECISION OF THE SUPREME COURT OF SOUTH DAKOTA IS CONCLUSIVE.

At the risk of tiresome repetition, we premise this portion of our brief with the statement that the case at bar is not one to perfect and quiet the title to the land in question nor is it a case to secure or establish a right to an Indian allotment nor a case in which the rights of any persons in whole or in part of Indian blood or descent are involved. The sole question in the case is, Is the title to the land merchantable? The Supreme Court of South Dakota has held that it is. The plaintiff argues that the County Court of Buffalo County, South Dakota, in which the estate of the deceased allottee, Weasel, was administered, had no jurisdiction to determine the question of heirship but, as stated by the Supreme Court of South Dakota in its opinion:

> "Whether or not the County Court of Buffalo County had jurisdiction to decide the question of heirship, it is not necessary to determine. The validity of the conveyance from the heirs of the allottee depended upon the confirmation and approval of the Secretary of the Interior. The deed purported to have been executed by

all of the heirs of the allottee and was approved by the Secretary of the Interior as a deed from all of such heirs. Whether that office acted upon the decree of final distribution entered by the County Court of Buffalo County or based its conclusion as to heirship upon information derived from some other souce, it is not necessary to inquire. The approval of the deed terminated the jurisdiction of the government over the land conveyed by that deed and from that time the land was under the exclusive jurisdiction of the State Courts."

The position so taken by the Supreme Court of South Dakota has in effect been approved by two recent decisions of this Court in the cases of *Dickson v. Luck Land Company*, 242 U. S. 371, 37 Sup. Ct. Rep. 137, and *United States v. Waller*, 243 U. S. 452, 37 Sup. Ct. Rep. 430.

The *Dickson-Luck Land Company Case* is instructive on the question of the presumptions to be given to the act of the Secretary of the Interior in approving the deed by the heirs of Weasel involved in the case at bar. In its opinion in that case, this Court says:

"There is no mention of his age in the patent and yet it must be taken as impliedly containing a finding that he was then an adult. This is so, because every patent for public or Indian lands carries with it an implied affirmation or finding of every fact made a prerequisite to its issue and because the provision in the Act of 1907 made the majority of the allottee a prerequisite to the issue of this patent. But some implications, although appropriately and generally indulged in support of titles held under the Government's patents * * * are not regarded as otherwise having any conclusive or controlling force. They are not judgments in the sense of the rules respecting estoppel by judgment, and we perceive no reason for giving them any greater force or influence than has been sanctioned by prior decisions.

"The provision in the Act of 1907 under which this patent was issued, does not make for a different conclusion. In so far as it is applicable here, it does no more than to withdraw a particular class of allotments from the restrictions imposed by Congress and to authorize the immediate issue of fee simple patents for them. Al-

> though saying nothing on the point, it evidently intends that the administrative officers shall be satisfied in each instance before issuing the patent that the allotment belongs to the particular class; and so the patent when issued carries with it an implication that those officers found the allotment to be of that class."

So we suggest that with respect to the case at bar when Congress by the Act of May 27, 1902, 32 St. L. 275, provided for the sale, with the approval of the Secretary of the Interior, of allotted land by the heirs of a deceased allottee before the expiration of the twenty-five years trust period fixed by the patent, Congress evidently intended that the Secretary of the Interior should be satisfied before approving any such sale that the allottee was dead and that the persons making the sale were his sole heirs. The Supreme Court of South Dakota, in its opinion in this case, has held that such action of the Secretary of the Interior is *prima facie* evidence of such facts and that the title resting on such a deed is, under the laws of South Dakota, merchantable. Of course, if the plaintiff had expressly raised the point that there was in fact an heir of the deceased allottee, Weasel, other than those who executed the deed in question *and had established that fact,* the situation might be different but a mere assertion that there may possibly be such an heir or that some time a claim may be asserted on account of such another heir, is of no avail and is immaterial. The Supreme Court of South Dakota has since expressly so held in the case of *Tripp v. Sieler,* 38 S. D. 321, 161 N. W. 337. In that case a title of exactly the same character as the title involved in the case at bar was under consideration and the Supreme Court of the State of South Dakota held that a deed which recited that the grantors were the heirs of the deceased allottee and was approved by the Secretary of the Interior, conveyed good *prima facie* title and it was incumbent upon the purchaser of the land from one claiming under such deed to show the existence of other heirs before he could rescind the sale.

In that case it appeared that the action of the Secretary of the Interior in approving the sale by the heirs was based upon a report made to the Commissioner of Indian Affairs by a special United States Indian agent in which report the agent named the grantors in the deed as the sole heirs of the allottee

and stated that there was no dispute as to the lawful heirs. While that does not appear from the Record in the case at bar, it is immaterial as the Supreme Court of South Dakota further states in its opinion that such recitals nor the approval of the deed by the Department of the Interior do not amount to an adjudication that the parties who executed the deed are the sole heirs of the allottee, yet the deed so executed and approved does convey good *prima facie* title and furthermore, as indicated by this Court in its opinion in the *Dickson-Luck Land Company Case, supra*, the presumption is that the Secretary of the Interior is satisfied of the facts recited in such deed approved by him when he approves it.

To state the situation somewhat differently, if a sale by the heirs of the deceased allottee, Weasel, of the land in controversy had not been made until after the enactment of the statute of June 25, 1910, 36 St. L. 855, hereinbefore referred to, it would have been the duty of the Secretary of the Interior to ascertain the legal heirs of the decedent and his decision thereon would have been final and conclusive. The sale, however, was made by the heirs and was approved by the Secretary of the Interior under a prior statute, that of May 27, 1902, 32 St. L. 275 and the legal presumptions which arise, as hereinbefore shown, upon and from the action of the Secretary of the Interior in approving such sale, are not to be collaterally attacked, will stand until they are directly assailed and overthrown and are sufficient, so far as that feature of the title to the land in question is concerned, in the absence of such direct attack, as held by the Supreme Court of South Dakota, its decision resting on grounds of general and state law, to make the title merchantable. We submit that the presumptions which arise from the act of the Secretary of the Interior in approving, under the express authority conferred upon him by an Act of Congress, a sale of the character made by the heirs of Weasel, are not to be disregarded and are not to be likely overthrown and that the views of this Court upon the effect of the acts of the Department of the Interior in issuing land patents, the presumptions to be indulged in support of the action of the officers of the Department and that all requirements properly preliminary to the action of that Department have been complied with and that the same cannot be attacked collaterally, as held in *Lee v. Johnson*, 116 U. S. 48, *Burke v. Southern*

Pacific Railroad Company, 234 U. S. 669, 710 and other cases involving similar questions, are applicable to the case at bar.

By the sale of the land in question by the heirs of the deceased allottee, Weasel, and the approval of such sale by the Secretary of the Interior, the United States relinquished all control over the land and the situation became in effect the same as if a fee simple patent to the land had been issued to such heirs or to the purchaser from them and thereafter all questions pertaining to the disposal of the lands are, as suggested by this Court in the *Dickson-Luck Land Company Case,* within the scope and operation of the laws of the state.

The defendant is not contending that if in fact there is an heir of the deceased allottee, Weasel, other than the three who executed the deed in question, such other heir is absolutely barred and foreclosed of his interest in this allotment and that he cannot establish and recover such interest in some appropriate action or proceeding. The possibility that there may be such other heir is not material. The plaintiff does not set up in his complaint the existence of such an heir and has at no stage of this action attempted to establish the existence of such an heir. The suggestion by the plaintiff that such other heir may possibly exist brings up for determination not, we beg to say, by this Court, but by the Supreme Court of the State of South Dakota, because it is a question for the Courts of the state only to determine, the question whether the possible existence of such an heir is sufficient to cloud the title. The Supreme Court of South Dakota in its decision in the case at bar has in effect held that it is not and in its later decision in *Tripp v. Sieler,* 38 S. D. 321, 161 N. W. 337, has expressly held in a similar case that, "A mere possibility that some defect not appearing of record may exist or may arise in the future, is not sufficient to cast a reasonable doubt on an apparently good title" and that, as stated above, it is incumbent upon one objecting to such a title to show the existence of other heirs before he could defeat the title on that account.

Supplementing the discussion of this particular question, we would call the attention of the Court to the fact that this action is one at law and not in equity and ask the Court, if it desires further discussion of the question, to refer to that portion of our brief presented to the Supreme Court of South Dakota in this case which will be found at page 104 of the

Record (the plaintiff having seen fit to incorporate that brief in full in the Record). In connection therewith may also properly be considered that portion of the same brief in which we discussed our contention that "The title was free from reasonable doubt and, therefore, marketable" which will be found at page 101 of the Record.

THE TENDER OF A DEED.

The plaintiff has seen fit to argue at page 28 of his brief a proposition which he states as follows:

> "No good and sufficient warranty deed was ever tendered by defendant in error to plaintiff in error for premises in controversy in accordance with the provisions of contract for sale thereof, entered into between the parties on April 15, 1911."

The defendant contends that the question of a tender is not involved in this case at the present time because, first, the question was not considered by the Supreme Court of South Dakota in its decision; second, it is in no way a Federal question, and third, the contract between the parties shown on page 15 of the Record was of such character that a tender of a deed by the defendant would not be required unless he desired to bring an action against the plaintiff for the specific performance of the contract. The question is also immaterial because as appears from a letter written by the plaintiff to the defendant, Exhibit "D", shown at page 11 of the record, the plaintiff had refused to accept the title and, therefore, a tender was waived and was not necessary. If this Court, however, should be of the opinion that the question of a tender as urged by the plaintiff should be considered by it, we would respectfully refer the Court to a discussion of that question made by us in our brief in the Supreme Court of the State of South Dakota, and which is found at page 60 of the Record, *et seq.* The discussion of the question of the tender of a deed will be found at folio 191 on page 89 of the Record.

ERRORS ARGUED BY PLAINTIFF AND THE CASES CITED BY HIM.

The alleged errors argued by plaintiff in his brief in this Court are substantially the same as those which he argued to the Supreme Court of the State of South Dakota, and the

cases cited by him in his brief are largely those which he presented to that Court. As appears from the preceding portion of this brief, we do not agree with the plaintiff upon the character of the questions properly before this Court for determination. Most of the cases cited by the plaintiff are commented upon and distinguished in those portions of our brief presented to the Supreme Court of the State of South Dakota which appear on pages 93 to 99 inclusive of the Record.

In this connection, we would also ask the Court to read the opinion of the Circuit Judge of the trial court in granting a new trial of the action which appears at page 103 of the Record.

CONCLUSION.

The defendant submits, therefore, that as the Supreme Court of South Dakota has held that the title of the defendant to the land in question is merchantable and complies with the contract between the parties and such holdings of that Court rest upon matters or grounds of general or state law strong enough to sustain the judgment of that Court, its judgment following the rule stated by this Court in *Hale v. Akers*, 132 U. S. 554, and often applied, must stand without regard to any Federal question which the plaintiff may contend is involved in the case, and that the writ of error should, therefore, be dismissed, but that if this Court is of the opinion that a Federal question is so presented to it herein that it must be considered by it, the judgment of the Supreme Court of South Dakota is nevertheless correct and should be affirmed.

Respectfully submitted,

CHARLES O. BAILEY and

JOHN H. VOORHEES,

Attorneys for Defendant in Error.

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SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 88

GEORGE W. EGAN, PLAINTIFF IN ERROR,

vs.

CHARLES S. McDONALD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

CHARLES O. BAILEY and
JOHN H. VOORHEES,
Attorneys for Defendant in Error.

SIOUXLAND PRINTING COMPANY — SIOUX FALLS, SOUTH DAKOTA

(25,099)

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Supplemental Brief for Defendant in Error

Since our brief for the defendant in error was printed, served on the plaintiff in error and transmitted to the clerk of this Court for filing, we have learned that the Supreme Court of the state of South Dakota has decided another case in which it has affirmed its decision in the case at bar, Egan v. McDonald, 36 S. D. 92, 153 N. W. 915, and its later decision in the case of Tripp v. Sieler, 36 S. D. 321, 161 N. W. 337, holding that a title of the character involved in the case at bar is marketable. The decision is in the case of *Kathleen Daugherty v. Samuel E. McFarland and Linda McFarland* and was announced and filed on January 18, 1918.

As the volume of the South Dakota Reports which will contain this opinion will not be printed for several months to come and as the opinion will not be printed in the Northwestern Reporter until some weeks after the case at bar is submitted to this Court, and as we deem the opinion so important that we wish to have it before this Court when it considers the case at bar, we print it in full herewith as a supplement to our brief. The opinion is as follows:

GATES, J.

Action to foreclose a mortgage given to secure perform-

ance of a contract for an exchange of lands. Findings, conclusions and judgment were entered in favor of plaintiff mortgagee. Defendants appeal from the judgment and an order denying a new trial. The basis of the judgment is a conclusion of law to the effect that the abstract of title to 80 acres of the land agreed to be conveyed by defendant Samuel E. McFarland to plaintiff did not show a marketable title. If that conclusion of law is sound, the judgment should in the main be sustained. If it is unsound, the judgment should be reversed. This 80 acre tract was allotted to a Sioux Indian, Paul Goodcloud, by the United States Government by trust patent (so-called), issued Nov. 24, 1894, pursuant to the Act of Congress of Feb. 8, 1887, ch. 119, §5, 24 Stat. 388, (U. S. Comp. St. 1916 §4201), (3 Fed. Stat. Ann. 494), as amended by the Act of Congress of Feb. 28, 1891, ch. 383, 26 Stat, 794, (U. S. Comp. St. 1916 §4222), (3 Fed. Stat. Ann. 499). Paul Goodcloud died and the County Court of Charles Mix county, S. D., assumed jurisdiction of his estate. In probate proceedings in said County Court in his estate the tract was distributed to Iron Soldier, his father. In probate proceedings in said County Court in Iron Soldier's estate the undivided two-thirds of this tract was distributed to the four children, of whom two were minors, and one-third to his widow, Ptesanwin. In partition proceedings in said estate in said County Court said tract was set apart to Ptesanwin on Sept. 9, 1904, and other allotted lands were set apart to the children. On Jany. 6, 1905, said tract was conveyed by deed from Ptesanwin to one August Lahr, which deed was approved by the Secretary of the Interior March 20, 1905. Subsequently Lahr conveyed to defendant Samuel E. McFarland. Other court proceedings in the Circuit Court of Charles Mix county were had and also proceedings before the Department of the Interior culminating in a decision of such department rendered in May, 1915, which we deem immaterial to the issue if, as we believe, the whole title to the tract passed to August Lahr by reason of the approval of his deed by the Secretary of the Interior. In the Indian Appropriation Act, Act of Congress of May 27, 1902, ch. 888, 32 Stat. 245, there was added §7 (32 Stat. 275), (U. S. Comp. St. 1916, §4223), (3 Fed. Stat. Ann. 505), which read as follows:

"That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee shall thereupon be subject to taxation under the laws of the state or territory where the same is situate; provided, that the sale herein provided for shall not apply to the homestead during the life of the father, mother or the minority of any child or children."

Presumably it was by reason of this statute that the County Court of Charles Mix county assumed that it had jurisdiction over this allotted land. In McKay v. Kalyton, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. R. 346, the present Chief Justice said:

"As observed in the Smith case, 194 U. S. 408, prior to the passage of the Act of 1894, 'the sole authority for settling disputes concerning allotments resided in the Secretary of the Interior.' This being settled, it follows that prior to the Act of Congress of 1894 controversies necessarily involving a determination of the title and incidentally of the right to the possession of Indian allotments while the same were held in trust by the United States were not primarily cognizable by any court, either state or Federal. It results, therefore, that the Act of Congress of 1894, which delegated to the courts of the United States the power to determine such questions, cannot be construed as having conferred upon the state courts the authority to pass upon Federal questions over which, prior to the Act of 1894, no court had any authority."

See also Smith v. Smith, 140 Wis. 599, 123 N. W. 146; S.

D. Const. Art. XXII, par. 2. We think it must be conceded that such County Court did not have such jurisdiction. The "proper court" referred to in said section was presumably the appropriate Federal Circuit Court authorized under the Act of Aug. 15, 1894, as amended by the Act of Feb. 6, 1901, ch. 217, §1, 31 Stat. 760, (U. S. Comp. St. 1916, §4214), (3 Fed. Stat. Ann. 503).

In Egan v. McDonald, 36 S. D. 92, 153 N. W. 915, we held that it was unnecessary to determine whether the County Court had such jurisdiction and whether the Secretary of the Interior acted upon such proceedings in approving a deed or acted upon information from another source. We held that the approval of the deed by the Secretary terminated the jurisdiction of the United States over the land and that by reason of a decree of the State Circuit Court in an action begun subsequently to such approval, the title was merchantable. In Tripp v. Sieler, 38 S. D. 321, 161 N. W. 337, we said:

> "While such recitals nor the approval of the deed by the Interior Department do not amount to an adjudication that the parties who executed the deed are the sole heirs of the allottee, the deed executed and approved under the above circumstances conveys good prima facie title and it was incumbent upon the respondent to show the existence of other heirs before he can defeat appellant's title on that account."

This position was affirmed in Oldham v. Nelson, 38 S. D. 451, 161 N. W. 814. In the foregoing opinions this court arrived at what we believe to be correct conclusions in spite of the lurking idea that if other heirs than those executing the deeds had been apparent, the titles might not have been merchantable. In Carlow v. Jordan, 39 S. D. ——, 162 N. W. 749, in considering said Acts of Congress as amended by the Act of May 8, 1906, ch. 2348, 34 Stat. 183, (U. S. Comp. St. 1916 §4203), (Fed Stat. Ann. 1909 Supp. 204), and the Act of June 21, 1906, ch. 3504, 34 Stat. 327 (U. S. Comp. St. 1916, §4235-6), (Fed. Stat. Ann. 1909 Supp. 207), we said:

> "Under the Federal law the plaintiff, as father of John Carlow deceased, had no interest whatever in said land until he received said patent. The interest in

> said land held by John Carlow during his lifetime was only a trust in his behalf. The legal title was at all times in the Federal Government."

It will be observed from these statutes and the Act of June 25, 1910, ch. 431, 36 Stat. 855, that at the present time upon the death of an allottee the so-called trust patent is cancelled and a patent in fee is granted to the heirs or to the purchaser as determined by the Secretary of the Interior. In the present case even if the heirs of Paul Goodcloud and of Iron Soldier were as determined by said County Court, yet it affirmatively appears that only one of the heirs of the latter executed the deed to August Lahr and that at that time there were four other heirs. This situation necessitates the determination of two questions: (1) the nature of the interest acquired by the allottee, and (2) the effect of the approval of the deed to Lahr by the Secretary of the Interior on March 20, 1905. In effect the contention of appellant is that the Secretary of the Interior had authority to sell allotted land in case of the death of of the allottee, and that by his approval of a deed purporting to convey the whole of the land, the whole title, legal and equitable, was thereby conveyed to the purchaser regardless of the fact that one or more heirs of the allottee did not join in the conveyance.

The contention of respondent is stated in her brief as follows:

> "It is our contention that the Secretary of the Interior has no arbitrary authority under any law or principle of equity; that the heirs of a deceased allottee inherit an equitable title to the land described in the instrument designated a trust patent, that they inherit the same interest which the deceased allottee had before his death, and that the Congress itself cannot by legislation subsequent to the issuance of the trust patent divest the equitable interest of the allottee or, after his death, of his heirs, and it is our contention that the Secretary of the Interior possesses no legal authority greater than that possessed by the United States Congress."

In support of this contention respondent relies chiefly upon Chase v. U. S., 138 C. C. A. 117, 222 Fed 593, but

that decision was reversed on Oct. 2nd, 1917, in U. S. v. Chase, 38 Sup. Ct. R. 24, wherein it was held that assignments of land under the Omaha treaty of 1865 amounted only to an apportionment of the tribal possessory right. We are of the view that the reasoning of the latter opinion is applicable to the allotment in question. This being the latest utterances of the Supreme Court it must be deemed to be a retraction of the following statement in McKay v. Kalyton, supra, viz:

> "The suggestion made in argument that the controversy here presented involved the mere possession and not the title to the allotted land is without merit, since the right of possession asserted of necessity is dependent upon the existence of an equitable title in the claimant under the legislation of Congress to the ownership of the allotted lands."

The concluding point decided in Harnage v. Martin, 242 U. S. 386, 61 L. ed. 382, 37 Sup. Ct. R. 148, would seem on the surface to sustain the right of an omitted heir to contest the conveyance but that case turns upon the proposition that there the interest of the allottees was ownership of the soil in place of the mere possessory right here shown. Such possessory right must be the only right given by the so-called trust patent, else the Act of Congress of June 25, 1910, ch. 431, 36 Stat. 855, (U. S. Comp. St. 1916, §4226), (Fed. Stat. Ann. 1912 Supp. 96), would be invalid as to allotments made prior thereto or at least as to those made prior to the Act of May 8, 1906, ch. 2348, 34 Stat. 182, (U. S. Comp. St. 1916, §4203), (Fed. Stat. Ann. 1909 Supp. 204). In Williams v. Johnson, 239 U. S. 414, 60 L. ed. 358, 36 Sup. Ct. R. 150, we find a resume of the oft repeated status of Indian allottees, viz:

> "It has often been decided that the Indians are wards of the Nation and that Congress has plenary control over tribal relations and property and that this power continues after the Indians are made citizens, and may be exercised as to restrictions upon alienation."

See also U. S. v. Nice, 241 U. S. 591, 60 L. ed. 192, 36 Sup. Ct. R. 696, and S. S. v. Waller, 243 U. S. 452, 61 L. ed. 843, 37 Sup. Ct. R. 430. In U. S. v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. R. 478, we find the following:

> "It was in fact the property of the United States and was put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them."

Specifically this language referred to personal property but from the whole of that decision we are of the view that the Supreme Court considered that language applicable as well to allotted lands. See also U. S. v. Pearson, 231 Fed. 270. In Bond v. U. S. 181 Fed. 613, a decision which has been cited with approval by the Supreme Court and which appears to us to be the best summary of the status of allottee Indians, the court said of the Act of Feb. 8, 1887:

> "By this act, the United States retained title to and control over the allotted lands during the trust period, without any right in the allottee to do more than occupy and cultivate them under a paper or writing, showing that at a particular time in the future, unless it is extended by the President, he would be entitled to a regular patent, conveying the fee. The property did not cease, by the allotment, to be the property of the United States nor subject to its control, nor did the allottee cease to be a ward of the government. The title still remained in the government, and the allottee remained in a condition of pupilage and dependency. The determination of all disputes concerning the allotment, its occupancy and possession, and the general control of the Indian remained with the Secretary of the Interior."

Some suggestion is made that the Act of Aug. 15, 1894, ch. 290, §1, 28 Stat. 305, as amended by the Act of Feb. 6, 1901, ch. 217, §1, 31 Stat. 760, (U. S. Comp. St. 1916, §4214), (3 Fed. Stat. Ann. 503) deprived the Secretary of the Interior of authority to settle disputes concerning allotments. It may be observed that the later enactment of May 27, 1902, supra, specifically authorized the Secretary of the Interior to approve the deed in question, but we are also of the view that the Act of 1894 as amended by the Act of 1901 did no more than vest authority in the then Federal Circuit Court concurrent with the Secretary of the Interior, and that when in Hallowell v. Commons, 239 U. S. 506, 60 L. ed. 409, 36 Sup. Ct. R. 202, the Supreme Court said in

reference to the Act of June 25, 1910, ch. 431, 36 Stat. 855, (U. S. Comp. Stat. 1916 §4226), (Fed. Stat. Ann. 1912 Supp. 96):

> "This act restored to the Secretary the power that had been taken from him by the acts of 1894 and February 6, 1901"

the court meant that the exclusive power had been taken from the Secretary by those acts and restored by the Act of 1910. Otherwise it would be difficult to explain the meaning of the clause in the Act of 1901:

> "and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him."

Another point worthy of consideration is that under the regulations of the Interior Department when a sale was sought to be made by the heirs of an allottee the land was examined by special agents of the Department and was appraised by the Department and it could not be sold for less than the appraised value. When the sale was made it was the whole of the tract that was sold and not the interest of any particular heir. The approval by the Secretary of the Interior was an approval of the sale of the whole tract, not of the sale of the interest of such particular heir. Another rule of the Department provided that no deed or conveyance for an undivided interest in any tract would receive approval. To our minds there would be no difference in legal effect between the conveyance in question which was approved by the Secretary under the Act of 1902 and a government patent issued directly to the purchaser under the provisions of the Act of June 25, 1910.

From the various Acts of Congress and from the interpretations thereof by the many decisions of the Supreme Court of the United States, we are of the opinion that the lands allotted under the Act of Feb. 8, 1887, continued to be Government property; that the Government by its Congress had complete authority over tribal Indians and over the property, real or personal, committed to them, unaccountable to any other body or tribunal; that while it held the property in trust for the Indians such trust differed

from the ordinary trust in that Congress had full authority to make or unmake the rules governing the execution of the trust; that the Federal Government could dispose of such property through the agency of the Secretary of the Interior; that by the approval of the deed in question it did convey to August Lahr the fee simple title to the whole of the tract involved, free and clear of the rights of any heirs of Goodcloud or of Iron Soldier; and that the rights, if any, of such omitted heirs should not follow the land, but should follow the fund realized upon the sale. U. S. v. Thurston Co., 74 C. C. A. 425, 143 Fed. 287; Nat. Bk. of Commerce v. Anderson, 77 C. C. A. 259, 147 Fed. 87.

While under the strict letter of the contract respondent might be entitled to prevail in the action regardless of whether the interest of the Indians in the land had been extinguished because the contract provided that certain proceedings should be instituted before the Secretary of the Interior, yet in view of the arguments submitted to this Court it is evident that the real ground of contention between the parties is the issue we have above decided. Therefore, and especially in view of the statement in respondent's brief, viz:

> "We will frankly say at this place that we make no claim whatever because the appellant Samuel E. McFarland did not institute proceedings before the Secretary of the Interior to cure the defects in the title to the land."

we treat that question as waived.

Hence it follows that the title tendered was marketable and the judgment and order appealed from must be reversed.

As will appear from the foregoing opinion in the case of *Daugherty v. McFarland* not only has the Supreme Court of the state reaffirmed its former holdings in the *Egan-McDonald* and *Tripp-Sieler* case that land titles of the character of the title in the case at bar are marketable, which holding had also been previously affirmed by that Court in the case of *Oldham v. Nelson,* 38 S. D. 451, 161 N. W. 814, but also now holds (as will appear from the latter part of the opinion) that under the Act of Congress of May

27, 1902, 32 St. L. 275, when a sale is made by heirs of a deceased allottee with the approval of the Secretary of the Interior, the sale is of the entire tract and is not of the interest of any particular heir and a deed issued to the purchaser in such a sale under the said Act of 1902 is of substantially the same effect as a patent would be if issued under the later Act of June 25, 1910, 36 St. L. 855, which later Act, however, as appears from our brief, is not involved in the case at bar, as the sale on which the title of the defendant in error rests was made prior to the enactment of that statute.

Respectfully submitted,

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